# Supreme Court of the United States

OCTOBER TERM, 1963

## No. 88

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NATIONAL LABOR RELATIONS BOARD,
PETITIONER

*vs.*

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, ET AL.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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[fol. A] * * *

[fol. B]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 16,588

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, AND JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
PETITIONERS

*vs.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

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Petition for Review of and Cross Petition for Enforcement of an Order of the National Labor Relations Board.

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JOINT APPENDIX—filed November 17, 1961

* * * *

[fol. 1]

# BEFORE THE NATIONAL LABOR RELATIONS BOARD

## CHARGE—filed January 9, 1961

FORM NLRB-508 (7-52)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved Budget Bureau No. 64-R003.1

### CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with the provisions of Sections 9 (f), (g), and (h) of the National Labor Relations Act.

DO NOT WRITE IN THIS SPACE

CASE NO. 19-00-155

DATE FILED 1-9-61

COMPLIANCE STATUS CHECKED BY:

INSTRUCTIONS: File an original and 3 copies of this charge, and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

NAME Fruit & Vegetable Packers & Warehousemen, Local 760

ADDRESS 16 North 3rd Ave., Yakima, Washington

THE ABOVE-NAMED ORGANIZATION(S) OR ITS AGENTS HAS(HAVE) ENGAGED AND IS (ARE) ENGAGING IN UNFAIR LABOR PRACTICES WITHIN THE MEANING OF SECTION 8(b) SUBSECTION(S) (4)(i) and (ii)(B) OF THE NATIONAL LABOR RELATIONS ACT, AND THESE UNFAIR LABOR PRACTICES ARE UNFAIR LABOR PRACTICES AFFECTING COMMERCE WITHIN THE MEANING OF THE ACT.

2. BASIS OF THE CHARGE (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about December 27, 1960, and thereafter, the said union induced and encouraged the employees of certain retail grocery stores in Seattle, Washington, to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, and has threatened, coerced, and restrained Safeway Stores and other retail employers, with an object of forcing or requiring said employers and other employers and persons to cease doing business with members of Tree Fruits Labor Relations Committee, Inc. and all other packers of Washington apples except Pacific Fruit and Produce Company.

3. NAME OF EMPLOYER Tree Fruits Labor Relations Committee, Inc.

4. LOCATION OF PLANT INVOLVED (Street, City, and State) Yakima, Washington

5. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.) fruit packers

6. IDENTITY PRINCIPAL PRODUCT OR SERVICE packing and storing apples

7. NO. OF WORKERS EMPLOYED about 700

8. FULL NAME OF PARTY FILING CHARGE Tree Fruits Labor Relations Committee, Inc.

9. ADDRESS OF PARTY FILING CHARGE (Street, City, and State) Holtzinger Building, Yakima, Washington

10. TEL. NO. GL 2-8555

11. DECLARATION

I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

BY MARY ELLEN KRUG
(Signature of representative or person making charge)

January 6, 1961
(Date)

Attorney
(Title or office, if any)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

GPO 919364

[fol. 2] Ext. 561

January 9, 1961

Fruit & Vegetable Packers &
Warehousemen, Local 760
16 North 3rd Avenue
Yakima, Washington

Re: Fruit & Vegetable Packers &
Warehousemen, Local 760
Case No. 19-CC-155
(Tree Fruits Labor Relations
Committee, Inc.)

Gentlemen:

We hereby serve upon you a copy of charge filed with this office by Tree Fruits Labor Relations Committee, Inc. I would appreciate receiving from you promptly a full and complete written account of the facts and statement of your position in respect to the allegations set forth in the charge.

This case has been assigned to Attorney Gordon M. Byrholdt who will contact you at some time during the investigation of this matter, and any communications relative to the case should be directed to this Board agent.

Very truly yours,

THOMAS P. GRAHAM, JR.,
Regional Director

Enclosure

Registered No. 243809
Return receipt requested

Certificate of service (omitted in printing)

[fol. 3]

# BEFORE THE NATIONAL LABOR RELATIONS BOARD

## AMENDED CHARGE—filed February 6, 1961

FORM NLRB-508 (7-61)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

Form Approved Budget Bureau No. 64-R003.9

### AMENDED CHARGE AGAINST LABOR ORGANIZATION OR ITS AGENTS

Where a charge is filed by a labor organization, or an individual or group on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with the provisions of Section 9 (f), (g), and (h) of the National Labor Relations Act.

DO NOT WRITE IN THIS SPACE

Case No. 19-00-155

Date Filed 1-9-61

Amended 2-6-61

INSTRUCTIONS: File an original and 3 copies of this charge, and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Compliance Status Checked By:

1. LABOR ORGANIZATION OR ITS AGENTS AGAINST WHICH CHARGE IS BROUGHT

Name: Fruit & Vegetable Packers & Warehousemen, Local 760 and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America

Address: 16 North Third Ave., Yakima, Washington,
552 Denny Way, Seattle 9, Washington

The above-named organization(s) or its agents has engaged in and is/are engaging in unfair labor practices within the meaning of section 8(b) subsection(s) (4)(i)(ii)(B) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. BASIS OF THE CHARGE (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

On or about December 27, 1960, and thereafter, the said unions induced and encouraged the employees of certain retail grocery stores in Seattle, Washington, to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, and have threatened, coerced, and restrained Safeway Stores and other retail employers, with an object of forcing or requiring said employers and other employers and persons to cease doing business with members of Tree Fruits Labor Relations Committee, Inc, and all other packers of Washington apples except Pacific Fruit and Produce Company.

3. NAME OF EMPLOYER: Tree Fruits Labor Relations Committee, Inc.

4. LOCATION OF PLANT INVOLVED (Street, City, and State): Yakima, Washington.

5. TYPE OF ESTABLISHMENT (Factory, mine, wholesaler, etc.): fruit packers

6. IDENTIFY PRINCIPAL PRODUCT OR SERVICE: packing and storing apples

7. NO. OF WORKERS EMPLOYED: About 700

8. FULL NAME OF PARTY FILING CHARGE: Tree Fruits Labor Relations Committee, Inc.

9. ADDRESS OF PARTY FILING CHARGE (Street, City, and State): Holtzinger Building, Yakima, Washington

10. TEL. NO.: GL 2-8555

11. DECLARATION

I DECLARE THAT I HAVE READ THE ABOVE CHARGE AND THAT THE STATEMENTS THEREIN ARE TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF.

By MARY ELLEN KRUG
(Signature of representative or person making charge)

Feb. 3, 1961 (Date)

Attorney (Title or office, if any)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U. S. CODE, TITLE 18, SECTION 1001)

GPO 918364

[fol. 4] Ext. 561

February 6, 1961

Fruit & Vegetable Packers &
Warehousemen, Local 760
16 North Third Avenue
Yakima, Washington

Joint Council No. 28 of the Int'l Bro.
of Teamsters, Chauffeurs, Warehousemen
and Helpers of America
552 Denny Way
Seattle 9, Washington

Re: Fruit & Vegetable Packers & Warehousemen, Local 760 and Joint Council No. 28 of the International Bro. of Teamsters, Chauffeurs, Warehousemen and Helpers of America
Case No. 19-CC-155
(Tree Fruits Labor Relations Committee, Inc.)

Gentlemen:

We hereby serve upon you a copy of an amended charge filed with this office by Tree Fruits Labor Relations Committee, Inc., which is largely self-explanatory.

I would appreciate receiving from you promptly a full and complete written account of the facts and a statement of your position in respect to the allegations set forth in this amended charge.

Very truly yours,

THOMAS P. GRAHAM, JR.,
Regional Director

[fol. 5] Enclosure

Registered No. 243879 and 243880
Return Receipt requested

Certificate of service (omitted in printing)

[fol. 6] * * * *

Before the

NATIONAL LABOR RELATIONS BOARD,

Nineteenth Region

Case No. 19-CC-155

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760

and

TREE FRUITS LABOR RELATIONS COMMITTEE, INC.

COMPLAINT AND NOTICE OF HEARING.—January 23, 1961

It having been charged by Tree Fruits Labor Relations Committee, Inc. (herein called Tree Fruits), that Fruit & Vegetable Packers & Warehousemen, Local 760 (herein called the Respondent) has engaged in and is engaging in certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 29 U. S. C. 151 *et seq.*, herein called the Act, the General counsel of the National Labor Relations Board, on behalf of said Board, by the undersigned Regional Director for the Nineteenth Region, acting pursuant to Section 10 (b) of the Act and the Board's Rules and Regulations, Series 8, Section 102.15, hereby issues this Complaint and Notice of Hearing and alleges as follows:

I.

The charge herein was filed on January 9, 1961, and a copy thereof was served on the Respondent by registered mail on January 9, 1961.

II.

The Respondent maintains its principal office at Yakima, Washington, and is a labor organization within the meaning of Section 2 (5) of the Act.

[fol. 7] III.

Tree Fruits is a Washington corporation with its principal office in Yakima, Washington. It is organized to advise with and act in behalf of its employer-members, which are business firms in the fruit packing industry in the vicinity of Yakima. Tree Fruits acts as the agent of its employer-members in labor disputes and in bargaining collectively with labor organizations that represent employees of its employer-members.

During the last fiscal year, the employer-members of Tree Fruits packed and sold and shipped to purchasers located outside the State of Washington apples and soft fruits valued in excess of $10,000,000.00.

IV.

Safeway Stores, Inc. (herein called Safeway), is a Maryland corporation with its principal office in Baltimore, Maryland, and is engaged in the retail sale of food in several states, including the State of Washington. During 1960, Safeway stores in the State of Washington received goods and merchandise shipped directly from outside the State of Washington valued in excess of $1,000,000.00.

V.

Tree Fruits and its employer-members are employers within the meaning of Section 2 (2) of the Act and are engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

VI.

Commencing on or about August 29, 1960, the Respondent engaged in picketing at the warehouses of the employer-members of Tree Fruits in an effort to obtain certain contractual agreements on behalf of the employees of the employer-members of Tree Fruits.

[fol. 8] VII.

Commencing on or about December 27, 1960, the Respondent, in furtherance of the objects referred to in

paragraph VI hereof, engaged in picketing at the premises of retail stores of Safeway, located in and about Seattle, Washington, which were engaged in the retail sale of apples grown in the State of Washington and packed or produced by the employer-members of Tree Fruits, or others.

VIII.

By its acts and conduct set forth in paragraph VII hereof and by other means, the Respondent has engaged in and has induced and encouraged individual employees of Safeway and other employers engaged in commerce or in an industry affecting commerce to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle, or work on goods or commodities or to perform services, and have threatened, coerced and restrained Safeway and other persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Safeway or other persons to cease using, selling handling, transporting, or otherwise dealing in the goods or commodities of, and to cease doing business with, the members of Tree Fruits, and thereby has engaged in, and is now engaging in, unfair labor practices within the meaning of Section 8 (b) (4) (i) (ii) (B) of the Act.

IX.

The activities of the Respondent, as described in paragraph VII hereof, occurring in connection with the operation of Safeway, Tree Fruits and its employer-members, and other employers, as described in paragraphs III and IV herein, have a close, intimate, and substantial rela- [fol. 9] tion to trade, traffic and commerce among the several states of the United States and have led to and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 8 (b) (4) (i) (ii) (B) and Sections 2 (6) and (7) of the Act.

Please Take Notice that on the 14th day of February, 1961, at 10:00 A. M. (PST), in the Hearing Room of the

National Labor Relations Board, 327 Logan Building, Seattle, Washington, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You Are Further Notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that unless it does so, all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Seattle, Washington, this 23rd day of January, 1961.

THOMAS P. GRAHAM, JR.,
Regional Director,
National Labor Relations Board,
Region 19,
327 Logan Building,
Seattle, Washington

[fol. 10] * * * *

Before the

NATIONAL LABOR RELATIONS BOARD,

Nineteenth Region

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, AND JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA

and

TREE FRUITS LABOR RELATIONS COMMITTEE, INC.

AMENDED COMPLAINT AND NOTICE OF HEARING—
February 14, 1961

It having been charged by Tree Fruits Labor Relations Committee, Inc. (herein called Tree Fruits), that Fruit & Vegetable Packers & Warehousemen, Local 760, and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America (herein respectively called Respondent Local and Respondent Council) have engaged in and are engaging in certain unfair labor practices affecting commerce as set forth in the National Labor Relations Act, as amended, 29 U. S. C. 151 et seq., herein called the Act, the General Counsel of the National Labor Relations Board, on behalf of said Board, by the undersigned Regional Director for the Nineteenth Region, acting pursuant to Section 10 (b) of the Act and the Board's Rules and Regulations, Series 8, Sections 102.15 and 102.17, hereby issues this Amended Complaint and Notice of Hearing and alleges as follows:

[fol. 11] I.

The original charge herein was filed on January 9, 1961, and a copy thereof was served on Respondent Local by registered mail on January 9, 1961.

The amended charge herein was filed on February 6, 1961, and copies thereof were served on the Respondents.

II.

Respondent Local maintains its principal office at Yakima, Washington, and Respondent Council maintains its principal office at Seattle, Washington. Each Respondent is a labor organization within the meaning of Section 2 (5) of the Act.

III.

Tree Fruits is a Washington corporation with its principal office in Yakima, Washington. It is organized to advise with and act in behalf of its employer-members, which are business firms in the fruit packing industry in the vicinity of Yakima. Tree Fruits acts as the agent of its employer-members in labor disputes and in bargaining collectively with labor organizations that represent employees of its employer-members.

During the last fiscal year, the employer-members of Tree Fruits packed and sold and shipped to purchasers located outside the State of Washington apples and soft fruits valued in excess of $10,000,000.00.

IV.

Safeway Stores, Inc (herein called Safeway), is a Maryland corporation with its principal office in Baltimore, Maryland, and is engaged in the retail sale of food [fol. 12] in several states, including the State of Washington. During 1960, Safeway Stores in the State of Washington received goods and merchandise shipped directly from outside the State of Washington valued in excess of $1,000,000.00.

V.

Tree Fruits and its employer-members are employers within the meaning of Section 2 (2) of the Act and are engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

VI.

Commencing on or about August 29, 1960, Respondent Local engaged in picketing at the warehouses of the em-

ployer-members of Tree Fruits in an effort to obtain certain contractual agreements on behalf of the employees of the employer-members of Tree Fruits.

VII.

Commencing on or about December 27, 1960, Respondent Local, assisted by Respondent Council, in furtherance of the objects referred to in paragraph VI hereof, engaged in picketing at the premises of retail stores of Safeway, located in and about Seattle, Washington, which were engaged in the retail sale of apples grown in the State of Washington and packed or produced by the employer-members of Tree Fruits, or others.

VIII.

By its acts and conduct set forth in paragraph VII hereof and by other means, Respondent Local and Respondent Council have engaged in and have induced and encouraged individual employees of Safeway and other [fol. 13] employers engaged in commerce or in an industry affecting commerce to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on goods or commodities or to perform services, and have threatened, coerced and restrained Safeway and other persons engaged in commerce or in an industry affecting commerce, with an object of forcing or requiring Safeway or other persons to cease using, selling, handling, transporting, or otherwise dealing in the goods or commodities of, and to cease doing business with, the members of Tree Fruits, and thereby have engaged in, and are now engaging in, unfair labor practices within the meaning of Section 8 (b) (4) (i) (ii) (B) of the Act.

IX.

The activities of Respondent Local and Respondent Council, as described in paragraph VII hereof, occurring in connection with the operation of Safeway, Tree Fruits and its employer-members, and other employers, as described in paragraphs III and IV herein, have a close, in-

timate, and substantial relation to trade, traffic and commerce among the several states of the United States and have led to and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce and constitute unfair labor practices affecting commerce within the meaning of Section 8 (b) (4) (i) (ii) (B) and Sections 2 (6) and (7) of the Act.

Please Take Notice that on the 28th day of February, 1961, at 10:00 A. M. (PST), in the Hearing Room of the National Labor Relations Board, 327 Logan Building, Seattle, Washington, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Amended Complaint, at which time and place you will [fol. 14] have the right to appear in person, or otherwise, and give testimony.

You Are Further Notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondents shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an Answer to said Amended Complaint within ten (10) days from the service thereof, and that unless they do so, all of the allegations in the Amended Complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Seattle, Washington, this 14th day of February, 1961.

THOMAS P. GRAHAM, JR.,
THOMAS P. GRAHAM, JR.,
Regional Director,
National Labor Relations
Board,
Region 19,
327 Logan Building,
500 Union Street,
Seattle 1, Washington

[fol. 15] * * * *

Before the

NATIONAL LABOR RELATIONS BOARD,

Nineteenth Region

Case No. 19-CC-155

[Title Omitted]

ANSWER OF RESPONDENT FRUIT AND VEGETABLE PACKERS & WAREHOUSEMEN'S LOCAL 760, TO AMENDED COMPLAINT—filed February 23, 1961

Answering the Amended Complaint herein, respondent Fruit and Vegetable Packers & Warehousemen's Local Union 760, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraphs I, II, III, IV, V and VI.

II.

Answering Paragraph VII, this respondent admits the allegations contained therein, but states that the assistance rendered by respondent Council, in connection with the activities described in said paragraph, consisted solely of the Council's loaning of an organizer to work for this respondent.

[fol. 16] III.

Denies the allegations of Paragraphs VIII and IX.

Wherefore, having fully answered the amended complaint herein, this respondent prays that same be dismissed.

RICHARD P. DONALDSON and
BASSETT, DAVIES & ROBERTS,
Attorneys for Respondent,
Fruit & Vegetable Packers & Warehousemen's Local 760,
811 Alaska Building,
Seattle 4, Washington

* * * *

Before the

NATIONAL LABOR RELATIONS BOARD,

Nineteenth Region

Case No. 19-CC-155

[Title Omitted]

ANSWER OF JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, TO AMENDED COMPLAINT.—filed February 23, 1961

Answering the Amended Complaint herein, respondent Joint Council No. 28 of the International Brotherhood of [fol. 17] Teamsters, Chauffeurs, Warehousemen, and Helpers of America, admits, denies and alleges as follows:

I.

Admits the allegations of Paragraphs I, II, III, IV, V and VI.

II.

Answering Paragraph VII, this respondent admits the allegations contained therein but states that the assistance which it rendered to respondent Local, in connection with the activities described in said paragraph, consisted solely of this respondent loaning a council organizer to work for respondent Local.

III.

Denies the allegations of Paragraphs VII and IX.

Wherefore, having fully answered the amended complaint herein, this respondent prays that the same be dismissed.

RICHARD P. DONALDSON and
BASSETT, DAVIES & ROBERTS,
Attorneys for Respondent,
Joint Council No. 28 of the
International Brotherhood
of Teamsters, Chauffeurs,
Warehousemen, and Helpers
of America,
811 Alaska Building,
Seattle 4, Washington

[fol. 18] • • • • •

Before the

NATIONAL LABOR RELATIONS BOARD,

Nineteenth Region

Case No. 19-CC-155

[Title Omitted]

STIPULATION OF FACTS.—February 23, 1961

It Is Stipulated and Agreed by and between Fruit & Vegetable Packers & Warehousemen, Local 760, and Joint Council No. 28, each affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (herein respectively called Local 760 and Joint Council No. 28), by their attorneys Bassett, Davies and Roberts, Tree Fruits Labor Relations Committee, Inc. (herein called Tree Fruits), by their attorneys McMicken, Rupp and Schweppe, and Gordon M. Byrholdt, Counsel for the General Counsel for the National Labor Relations Board, in order to effectuate the purposes of the National Labor Relations Act, as amend-

ed, 61 Stat. 136, 73 Stat. 519, and to avoid unnecessary cost and delay:

1. The Charge, Amended Charge, Complaint, Amended Complaint, Affidavit of Service of the charge and the [fol. 19] amended charge, Answer and this Stipulation of Facts and the exhibits attached hereto constitute the entire record of the case and that no oral testimony is necessary or desired by any of the parties. The parties further stipulate that they waive a hearing and the taking of testimony or the submission of evidence before a Trial Examiner, the making of findings of fact and conclusions of law by the Trial Examiner, and the issuance of an Intermediate Report and recommended Order; and that they desire to submit this case for findings of fact and conclusions of law and issuance of order directly by the Board.

2. Upon a charge and amendment thereto filed by Tree Fruits, General Counsel for the National Labor Relations Board, on behalf of said Board by the Regional Director of the Nineteenth Region, issued a Complaint and Notice of Hearing herein on the 23rd day of January, 1961, and an Amended Complaint and Notice of Hearing on February 14, 1961.

3. The Answers of the Respondents to the Amended Complaint was duly filed with the Regional Director on February 23, 1961.

4. Local 760 and Joint Council No. 28 are labor organizations within the meaning of Section 2 (5) of the Act.

5. Tree Fruits is a Washington corporation with its principal office in Yakima, Washington. It is organized to advise with and act on behalf of its employer-members which are business firms in the fruit packing and warehousing industry in the vicinity of Yakima. Tree Fruits acts as the agent of its employer-members in labor disputes and in the bargaining collectively with labor organizations that represent employees of its employer-members.

During the last fiscal year, the employer-members of Tree Fruits packed, sold and shipped to purchasers lo- [fol. 20] cated outside the State of Washington apples and soft fruits valued in excess of $10,000,000.00.

6. Safeway Stores, Inc. is a Maryland corporation with its principal office at Baltimore, Maryland, engaged in retail sale of food in several states, including the State of Washington. During 1960, Safeway Stores in the State of Washington received goods and merchandise shipped directly from outside the State of Washington valued in excess of $1,000,000.00 and made sales at retail in excess of $1,000,000.00.

7. Tree Fruits and its employer-members and Safeway Stores, Inc. are each employers within the meaning of Section 2 (2) of the Act and are engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

8. Washington State has a large fresh fruit packing and warehousing industry. There are numerous firms engaged in this industry. Generally speaking, these firms obtain fresh fruit on consignment from the growers, store it at their warehouses, and sell, pack and ship it to various markets, as the demand dictates. Upon selling the fruit, these firms will deduct from the proceeds of the sale a charge for their services in storing, packing and selling the fruit and other charges, and remit the balance to the growers.

The employees who work for these firms, except those who work for certain firms in the area of Yakima, Washington, are not members of organized labor, and there are no collective bargaining agreements existing between these firms and any labor organization.

In the area of Yakima, Washington, there are twenty-four (24) fresh fruit packing and warehousing firms, the majority of whose employees were members of Respondent [fol. 21] Local 760 on August 29, 1960. Local 760 has acted as collective bargaining representative for these employees for a number of years. Twenty-one (21) of these firms are members of Tree Fruits, and have bargained with Local 760 through Tree Fruits. Exhibit No. 1 is a list of these firms. The other three (3) firms (Pacific Fruit and Produce Co., Yakima, Fruit Growers Association, and Forney Fruit and Produce Co.) have bargained with Local 760 separately. There are more than 1,500 employees working for these firms during the main packing season, which is the apple packing season.

In 1960, the collective bargaining agreements between Local 760 and the aforesaid firms were terminated and the parties attempted to negotiate new agreements. The main negotiations were those involving Local 760 and Tree Fruits. During these particular negotiations, Tree Fruits asked for several modifications in the agreement concerning union security, seniority, overtime, etc., asserting that it had to have such modifications in order to meet the competition of the non-union firms in the industry. Following several negotiating meetings, Local 760 called a strike against the Tree Fruit employers, starting on August 29, 1960. Strikes were also called against the Yakima Fruit Growers Association and against Forney Fruit and Produce Company. An agreement was reached with Pacific Fruit and Produce Company, and no strike was called against that company.

At all times relevant hereto, Local 760 and its members were actively continuing in strikes against the aforesaid employers.

9. In December, 1960, Local 760 decided, in furtherance of its disputes with the aforesaid employers, to engage in a consumer boycott program, asking the public not to buy Washington State apples. Local 760 then re- [fol. 22] quested of Joint Council No. 28, with which it is affiliated, that Joint Council organizers be loaned to Local 760 for the purpose of assisting with this program. Thereafter, the Joint Council Executive Board assigned Mr. Fred Bowen, a Joint Council organizer, to work with Local 760 until further notice. (See Exhibits Nos. 2 and 3, which are from the December 23, 1960 and the January 21, 1961 issues, respectively, of the Washington Teamsters, the official publication of Joint Council No. 28.) While so engaged on behalf of Local 760, and at all times relevant hereto, Fred Bowen acted under the direction and control of Mr. James Farrington, Secretary-Treasurer of Local 760. During this time he was paid his usual organizer's salary and expense allowance, by the Joint Council.

In late December, 1960, Mr. Farrington instructed Mr. Bowen to carry out a program of picketing and handbilling at the premises of certain Safeway stores in Seattle, Washington. Said stores were then engaged in the

sale of apples which they had obtained from employers belonging to the Tree Fruits group.

On December 27 and 29, 1960, and on January 5, 6, 7, 12, 13, 14 and 19, 20, 21, 1961, pickets who carried placards and distributed handbills, appeared at the premises of several Safeway stores located in and near Seattle, Washington. Exhibit No. 4 is a list of the stores. In most cases, two (2) pickets appeared at each store, but at one store there were (3) pickets. These pickets consisted of: (1) union representatives in the Seattle area who volunteered their services; (2) striking members of Local 760 who traveled from Yakima to Seattle for this purpose; and (3) hired pickets, who were obtained locally, and paid by Local 760 for their services.

Mr. Farrington instructed Mr. Bowen as to how the program of picketing and handbilling should be carried on [fol. 23] and Bowen, in turn, instructed the pickets. Before any person was permitted to picket or distribute handbills, he was furnished with a copy of a document entitled, "Instructions to Pickets", signed by Bowen, as a representative of Local 760. Exhibit No. 5 is a copy of said "Instructions to Pickets." The picketing was at all times conducted in conformity with these instructions.

Before the picketing began and before any handbills were distributed, either Mr. Bowen or one of the pickets approached each store manager and gave him a document entitled, "Notice to Store Manager and Store Employees", signed by Bowen, as a representative of Local 760, together with a copy of the document entitled, "Instructions to Pickets". Exhibit No. 6 is a copy of the "Notice to Store Manager and Store Employees."

The pickets patrolled in front of the store premises, wearing cardboard placards stating as follows:

> "TO THE CONSUMER: NON-UNION WASHINGTON STATE APPLES ARE BEING SOLD AT THIS STORE. PLEASE DO NOT PURCHASE SUCH APPLES. THANK YOU. TEAMSTERS LOCAL 760, YAKIMA, WASHINGTON."

They also distributed handbills. Exhibits No. 7 and No. 8 are copies of the two types of handbills which were

distributed. Exhibit No. 9 is a photograph of two pickets in front of one of the stores.

The pickets appeared at the store premises after the stores opened for business and left before the stores closed. They walked back and forth on the sidewalks in front of the main customer entrances to the stores, handing handbills to any persons passing by who were willing to accept them. At no time did they walk in front of the store [fol. 24] entrances which were used solely by the employees of the stores, or used solely for the delivery of merchandise.

At several locations the Safeway stores were situated to the rear of a parking lot and the pickets, wearing placards bearing the legend herein referred to, confined their picketing to the public sidewalk near the entrance to the parking lot in conformity with the "Instructions to Pickets", Exhibit No. 5, subparagraph 2. At these locations the pickets were unable to distribute handbills in any large numbers to the store patrons, as such patrons usually drove through the entrances of the parking lot without stopping and went directly into the store from their parked automobile.

The pickets were visible, through the windows of the stores, to some of the employees working in the stores. Some of the employees of the stores used the main customer entrances to the stores for ingress and egress and, in so doing, passed by the pickets.

At all times, while the picketing and handbilling was being conducted, the employees of the stores continued to work in the normal way. Likewise, the stores continued to receive deliveries of merchandise in the normal way. No deliveries or pickups were stopped or interfered with and no employee of Safeway or of any other employer quit work or refused to handle fruit packed by the employer-members of Tree Fruits.

At all times, the picketing and handbilling was peacefully conducted. The entrances to the stores were not blocked and ingress and egress was not interfered with.

10. That this Stipulation of Facts is made without prejudice to any of the objections that any party may have as to the materiality or relevancy of any facts stated herein.

[fol. 25] 11. That the parties to this stipulation shall have thirty (30) days from the date of execution of the stipulation to file briefs to the Board and to request oral argument before the Board, and the failure of any party to file briefs or to make request for oral argument within this time shall be deemed a waiver of the right to file such briefs or request.

Executed this 23rd day of February, 1961.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760,

By RICHARD P. DONALDSON
For BASSETT, DAVIES & ROBERTS,

JOINT COUNCIL NO. 28, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

By RICHARD P. DONALDSON,
For BASSETT, DAVIES & ROBERTS,

TREE FRUITS LABOR RELATIONS COMMITTEE, INC.,

By MARY ELLEN KRUG,

COUNSEL FOR THE GENERAL COUNSEL,

By GORDON M. BYRHOLDT,
GORDON M. BYRHOLDT

[fol. 26]

EXHIBIT NO. 1 TO STIPULATION OF FACTS

ACKLEY FRUIT COMPANY
CUBBERLY FRUIT CO.
HANSEN FRUIT AND COLD STORAGE CO.
HIGHLAND FRUIT GROWERS, INC.
C. M. HOLTZINGER FRUIT CO.
W. W. JUDY FRUIT CO.
LARSON FRUIT CO.
MATSON FRUIT CO.
NORDBERG SELAH FRUIT, INC.
NORDBERG-WESTBROOK FRUIT, INC.
J. N. PERRY ICE & COLD STORAGE CO.
PERHAM FRUIT CORPORATION
PRENTICE PACKING AND COLD STORAGE CO.
RICHEY & GILBERT CO.
W. F. ROCHE FRUIT CO.
STADELMAN FRUIT CO.
SUNDQUIST FRUIT AND STORAGE CO.
WARREN & COMPANY
WASHINGTON FRUIT & PRODUCE CO.
WILLIAMS FRUIT CO.
YAKIMA FRUIT & COLD STORAGE CO.[1]

[1] Local 780 contends that there were 24 Tree Fruits employers involved in the strike. Tree Fruits position, however, is that 3 of the employers had gone out of business.

# DON'T BUY UNFAIR WASHINGTON APPLES

552 Denny Way, Seattle 9, Wn.
*Return Postage Guaranteed*

# WASHINGTON TEAMSTER

OFFICIAL PUBLICATION JOINT COUNCIL OF TEAMSTERS NO. 28

***Labor's greatest voice in the Pacific Northwest***

Vol. XXIII, No. 43 — SEATTLE, WASHINGTON December 23, 1960

## Joint Council to push Seattle apple boycott

**A wire to Joint Council of Teamsters No. 42, Los Angeles, re-affirming the Washington Joint Council's wholehearted support of the Yakima Apple Boycott was read at the Tuesday meeting of statewide Teamster secretaries and business agents.**

**Plans for similar boycott action in the Los Angeles area prompted the wire from the executive board of Joint Council No. 28.**

**Meanwhile, machinery was set in motion to start picketing stores in the greater Seattle area that are handling and selling non-union Yakima apples late this week.**

**Fred J. Bowen, an organizer for the Joint Council, was appointed by Chairman Frank W. Brewster to head up the picketing detail.**

**Labels of the four brands of apples that are "fair" were displayed at the Tuesday meeting to acquaint the local Teamster leaders with brand names. All apples excepting those from Pacific Fruit are on the boycott list of Cannery Warehousemen Local 760, Yakima.**

**The union is striking 33 warehouses in the Yakima valley area for a new contract and retention of unionism conditions achieved over a long period of time. The employers are out to bust the union and turn back the clock a quarter of a century to open shop, phoney "right to work" conditions.**

**Each union in the Seattle Joint Council area was requested to supply volunteers to aid the picket work at large stores selling unfair Yakima apples.**

OFFICIAL PUBLICATION, JOINT COUNCIL OF TEAMSTERS NO. 28

# WASHINGTON TEAMSTER

Labor's greatest voice in the Pacific Northwest

Vol. XXII, No. 47 | SEATTLE, WASHINGTON | January 20, 1961

# SEATTLE PICKETING STEPPED UP BY LOCAL 760 MEMBERS

## 40 ladies 'invade' chain store area

### All-out drive to alert public of non-union apple boycott

"Forty Ladies from Hell"—which, in this case, is the Yakima Valley strike area, invaded the Seattle chain store domain Thursday afternoon to picket in front of stores handling non-union Yakima apples.

The ladies, all members of Fruit and Produce Warehousemen's Local 760, came to the Seattle area aboard a chartered bus. They planned to picket, with informational signs on Thursday, Friday and Saturday of this week telling the public of the facts behind the long strike at the 23 apple warehouses in the valley.

Local 760 is battling for its life against the fat-subsidized Yakima apple barons and to hold union wages and conditions by keeping union integrity and solidarity.

The picketing of Thursday afternoon and business agents last Thursday in Seattle voted all-out support of the Local 760 struggle, and the strike picketing will be assigned with the visitors.

Fred J. Brown, organizer for Joint Council of Teamsters No. 28, in announcing Local 760 in the informational picketing and pamphlet program in Seattle, Brown reported that two Joint Council organizers have also been assigned, as well as business agents and committees from almost every Teamster Union in the Seattle area also to help at the lines.

"The Joint Council is making every conscious legally possible to help Local 760 win this strike against the Yakima apple packers," Teamsters' General W. Brewster said. "This is a direct attack against union security which is the very foundation and cause of existence of a trade union movement. If the employers win here, they will try to spread this 'right to work' influence elsewhere."

Secretary James Partington also spoke at the Tuesday meeting reporting that meetings were scheduled between the union and the management groups this week, "but if they are anything like the previous meetings, little or nothing can be expected."

Partington stated that the morale of the strikers is good and that the boycott strikers is being felt by a sharp drop in apple car loadings from the strike region to date which.

[fol. 28]

EXHIBIT NO. 3 TO STIPULATION OF FACTS

25

[fol. 29]

## Exhibit No. 4 to Stipulation of Facts

Safeway Stores

| | |
|---|---|
| 2 pickets January 12 | W. Spokane and Chelan |
| 2 pickets January 6 | California & W. College |
| 2 pickets January 7 | California & W. Dawson |
| 2 pickets January 12 | 35th S. W. & Morgan |
| 2 pickets January 5, 6 & 7 | 15th S. W. & Roxbury |
| 2 pickets January 7 | 4th S. & Michigan |
| 2 pickets December 27th and 29th | Rainier & Dawson |
| 2 pickets January 13 | Empire Way & Othello |
| 3 pickets January 12, 13 and 14 | S. 216 & Highway 99 |
| 2 pickets January 14 | Renton, 3rd Ave. & Shaddock |
| 2 pickets January 12 and 13 | Renton, 2nd Ave. & Wells |
| 2 pickets January 5, 6, and 7 | Top Hat, 112 First Ave., So. |
| 2 pickets January 5, 6, and 7 | Burien, S. W. 152nd & Ambaum Road |
| 2 pickets January 12, 13 and 14 | Do. |
| 2 pickets December 29 | Burien, Ambaum & 143rd S. W. |
| 2 pickets January 5 and 6 | No. 36th & Dayton |
| 2 pickets December 27 and 29 | No. 40th & Stoneway |
| 2 pickets December 29th | No. 155th & Aurora |
| 2 pickets December 27 | No. 105th & Aurora |
| 2 pickets December 29 | E. 125th & Bothell Way |
| 2 pickets December 27 | 15th N. W. & W. 85th |
| 2 pickets January 5 | W. 80th & 24th N. W. |
| 2 pickets January 7 | 22nd N. W. & W. 57th |
| 2 pickets January 6 and Jan. 14 | No. 87th & Greenwood Ave. |
| 2 pickets January 5 | No. 71st & Greenwood Ave. |
| 2 pickets January 5 | No. 45th & Bagley |
| 2 pickets January 6 | E. 50th & Brooklyn |
| 2 pickets December 27 and 29th | 35th N. E. & E. 75th |
| 2 pickets Dec. 27 and 29 | E. 73rd & Roosevelt Way |
| 2 pickets Jan. 12 & 13 | Do. |
| 2 pickets December 27 and 29 | 15th N. E. & E. 173rd |
| 2 pickets January 5 | Edmonds, 5th & Main |
| 2 pickets January 13 and 14 | First Ave., West, & Mercer |
| 2 pickets January 14 | Highway 99 & Midway |
| 2 pickets Dec. 27 and 29 | 516 First Ave., West |
| 2 pickets Jan. 7 and 12 | Eastlake & Hamlin |
| 2 pickets Jan. 6 | Boren Ave. & Olive Way |
| 2 pickets Jan. 7 | Broadway & E. Harrison |
| 2 pickets January 12 | 15th No. & John St. |
| 2 pickets January 7 | Madison & Summit |
| 2 pickets January 6 | 23rd Ave. & E. Union |
| 2 pickets January 6 | 8th Ave., So., & Jackson |
| 2 pickets January 5 | 23rd Ave., So., & Jackson |
| 2 pickets January 6 | Occidental & Yesler |
| 2 pickets January 13 & 14 | Rainier & Forrest |
| 2 pickets January 14 | Airport Way & 13th So. |
| 2 pickets January 13 and 14 | Bellevue, 104th N. E. & 4th |
| 2 pickets January 12 | Kirkland, Kirkland Ave. & 3rd |

[fol. 30]

EXHIBIT NO. 5 TO STIPULATION OF FACTS

Telephone GLencourt 2-7194

Fruit & Vegetable Packers & Warehousemen
Local No. 760
I. B. of T. C. W. & H. of A.

Jim Farrington
Secretary-Treasurer

16 North 3rd Avenue
Yakima, Washington

Instructions to Pickets.

Dear Picket:

You are being asked to help publicize a nationwide consumer boycott aimed at non-union Washington State Apples. To make this program a success your cooperation is essential. Please read these instructions and follow them carefully.

1 At all times you are to engage in peaceful picketing. You are forbidden to engage in any altercation, argument, or misconduct of any kind.

2. You are to walk back and forth on the sidewalk in front of the consumer entrances to the grocery stores. If a particular store is located toward the rear of a parking lot, you are to ask the store manager for permission to walk back and forth on the apron or sidewalk immediately in front of the store; but if he denies you this permission, you are to picket only on the public sidewalk at the entrances to the parking lot. As far as large shipping centers are concerned, you will be given special instruction for picketing in such locations.

3. You are not to picket in front of or in the area of any entrance to the store which is apparently set aside for the use of store employees and delivery
[fol. 31] men. As noted above, you are to limit your picketing to the consumer entrances to the store.

4. This union has no dispute with the grocery stores, and you are forbidden to make any statement to the effect that the store is unfair or on strike. You

are also forbidden to request that the customers not patronize the store. We are only asking that the customers not buy Washington State apples, when they are shopping at the store.

5. Similarly, you are not to interfere with the work of any employees in the store. If you are asked by these employees what the picketing is about, you are to tell them it is an advertising or consumer picket and that they should keep working. Likewise if you are asked by any truck drivers who are making pickups or deliveries what the picket is about, you are to advise that it is an advertising or consumer picket and that it is not intended to interfere with pickups or deliveries (i.e. that they are free to go through).

6. If you are given handbills to distribute, please distribute these handbills in a courteous manner and if the customers throw them on the ground, please see that they are picked up at once and that the area is kept clean.

7. You are forbidden to use intoxicating beverages while on duty or to have such beverages on your person.

8. If a state official or any other private party should complain to you about the picketing, advise them you have your instructions and that their complaints should be registered with the undersigned union representative.

9. These instructions should answer most of your questions concerning this program. However, if you [fol. 32] have any additional questions or if specific problems arise which require additional instructions, please call the undersigned.

TEAMSTERS UNION LOCAL 760,

By .....
Representative

.....
Address

.....
Phone Number

EXHIBIT NO. 6 TO STIPULATION OF FACTS

Notice to Storage Manager and Store Employees.

We are advised that you are presently engaged in selling Washington State Apples.

The 1960 crop of Washington State Apples is being packed by non-union firms, including 26 firms in the Yakima Valley. Prior to this year, the 26 Yakima Valley firms had been parties to a collective bargaining contract with Teamsters Union Local 760 of Yakima, Washington, but this year, when a new contract was being negotiated, the employers took the position that many of the basic provisions of the prior contract, such as seniority, overtime, protection against unjust discharge, grievance procedure and union security, should be weakened or eliminated entirely. These extreme demands plus a refusal to bargain in good faith led to a strike against the employer. The union made all possible efforts to avoid this strike as did outside agencies who were assisting in the negotiations. Even the Governor of the State of Washington, the Honorable Albert D. Rosellini, intervened and suggested that the parties agree to a fact finding committee or arbi- [fol. 83] tration. The union agreed to these proposals but the employers declined.

The employer's refusal to bargain in good faith has caused the Seattle office of the National Labor Relations Board to prepare a complaint against the employers, charging them with unfair labor practices in violation of federal law.

The strike at Yakima is still continuing and in order to win this strike, we must ask the consuming public not to purchase Washington State Apples.

Therefore, we are going to place peaceful pickets at the entrances to your store for the purpose of trying to persuade the public not to buy Washington Apples. These pickets are being instructed to patrol peacefully in front of the consumer entrances of the store, to stay away from the delivery entrances and not to interfere with the work of your employees, or with deliveries to or pickups from your store. A copy of the instructions which have been furnished to the pickets is attached herewith.

We do not intend that any of your employees cease work as a result of the picketing. We ask that you advise your employees of our intentions in this respect, perhaps by posting this notice on your store bulletin board.

If any of your employees should stop work as a result of our program, or if you should have any difficulties as far as pickups and deliveries are concerned, or if you observe any of the pickets disobeying the instructions which they have been given, please notify the undersigned union representative at once and we will take steps to see that the situation is promptly corrected.

As noted above, our information indicates that you are presently selling Washington State Apples. If, however, this information is not correct and your are selling apples [fol. 34] exclusively from another state, please notify the undersigned and we will see that the pickets are transferred to another store where Washington State Apples are actually being sold.

Thank you for your cooperation.

TEAMSTERS UNION LOCAL 760
Yakima, Washington.

By .....
Representative

.....
Address

.....
Phone

[fol. 35]

EXHIBIT NO. 7 TO STIPULATION OF FACTS

# DON'T BUY WASHINGTON STATE APPLES

## THE 1960 CROP OF WASHINGTON STATE APPLES IS BEING PACKED BY NON-UNION FIRMS

Included in this non-union operation are twenty-six firms in the Yakima Valley with which there is a labor dispute. These firms are charged with being

# UNFAIR

by their employees who, with their union, are on strike and have been replaced by non-union strikebreaking workers employed under substandard wage scales and working conditions.

In justice to these striking union workers who are attempting to protect their living standards and their right to engage in good-faith collective bargaining, we request that you

# DON'T BUY WASHINGTON STATE APPLES

TEAMSTERS UNION LOCAL 760
YAKIMA, WASHINGTON

This is not a strike against any store or market.

(P.S.—PACIFIC FRUIT & PRODUCE CO. is the only firm packing Washington State Apples under a union contract.)

[fol. 36]

EXHIBIT NO. 8 TO STIPULATION OF FACTS

# WE HAVE TO TELL THE WORLD

THAT THE 1960 CROP OF

# WASHINGTON STATE APPLES

## IS BEING PACKED BY NON-UNION FIRMS

**These non-union firms include 26 firms operating under strike conditions with their union members replaced on the job by strikebreakers. These striking workers have declared that these twenty-six struck firms are**

# UNFAIR

**because, not only are the strikebreakers working under non-union wage and hour conditions, but also because, although the voters of Washington State have TWICE decisively turned down the vicious "RIGHT TO WORK" proposals at general elections, these struck firms ARE TRYING TO FORCE THE VICIOUS "RIGHT TO WORK" CONDITIONS ON THEIR WORKERS.**

**These striking workers, faced with the gigantic task of protecting their living standards and their right to bargain in good faith for their economic welfare, request that you**

# DON'T BUY WASHINGTON STATE APPLES

**TEAMSTERS UNION LOCAL 760**
**YAKIMA, WASHINGTON**

**This is not a strike against any store or market.**

**(P.S. PACIFIC FRUIT & PRODUCE CO. is the only firm packing Washington State Apples under a union contract.)**

[fol. 37]

EXHIBIT NO. 9 TO STIPULATION OF FACTS

[fol. 38]

132 NLRB No. 102

D-2371
Seattle, Wash.

* * * *

Before the

NATIONAL LABOR RELATIONS BOARD

Case No. 19-CC-155

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, AND JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

and

TREE FRUITS LABOR RELATIONS COMMITTEE, INC.

DECISION AND ORDER—August 24, 1961

Upon unfair labor practice charges filed on January 9, 1961, as amended on February 6, 1961, by Tree Fruits Labor Relations Committee, Inc., herein called Tree Fruits, against Respondents, Fruit & Vegetable Packers & Warehousemen, Local 760, and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein respectively called Local 760 and Joint Council No. 28, the General Counsel of the National Labor Relations Board by the Regional Director for the Nineteenth Region issued an amended complaint alleging that Respondents had engaged in and were engaging in unfair labor practices within the meaning of Section 8 (b) (4) (i) and (ii) (B) of the Act. Copies of the complaint, charges and notice of hearing were served upon the Respondents and the charging party.

[fol. 39] With respect to the unfair labor practices, the complaint alleged that by picketing at the premises of retail stores of Safeway Stores, Inc., in Seattle, Washington, Respondents have induced and encouraged employees of

Safeway and of other employers engaged in commerce or in an industry affecting commerce to engage in strikes and have threatened, coerced and restrained Safeway and other employers, with an object of forcing Safeway or other persons to cease doing business with members of Tree Fruits. Thereafter, Respondents filed an answer denying the material allegations of the complaint.

On February 23, 1961, all parties entered into a "Stipulation of Facts" waiving a hearing and the taking of testimony before a Trial Examiner, the making of findings of fact and conclusions of law by a Trial Examiner, and the issuance of an Intermediate Report and Recommended Order. They further agreed to submit the case directly to the Board for findings of fact, conclusions of law, and order based upon a record to consist entirely of the charge, amended charge, complaint, amended complaint, answers, and the "Stipulation of Facts" and exhibits attached thereto.

On March 8, 1961, the Board approved the stipulation and transferred the case to itself. Thereafter, the General Counsel, the Respondents and Tree Fruits filed briefs.

Upon the basis of the stipulation and the entire record in the case, the Board [1] makes the following:

## Findings of Fact.

I. Tree Fruits Labor Relations Committee, Inc., is a Washington corporation with its principal office in Yaki- [fol. 40] ma, Washington. It acts as the agent of its employer-members in labor disputes and in collective bargaining with labor organizations which represent employees of its members. During the last fiscal year, the employer-members of Tree Fruits packed, sold and shipped to purchasers located outside the State of Washington apples and soft fruits valued at more than $10,000,000.

Safeway Stores, Inc., a Maryland corporation with its principal office in Baltimore, Maryland, is engaged in the

[1] Pursuant to the provisions of Section 3 (b), the Board has delegated its powers in connection with this case to a three-member panel.

retail sale of food in several States, including the State of Washington. During 1960, Safeway Stores received in the State of Washington from sources outside the State merchandise valued at more than $1,000,000. Its retail sales during the same period were in excess of $1,000,000.

The parties admit, and we find, that Tree Fruits and Safeway Stores are engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

II. Fruit & Vegetable Packers & Warehousemen, Local 760, and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2 (5) of the Act.

III. The facts.

Tree Fruits represent 21 fresh fruit packing and warehousing firms in the Yakima, Washington, area, in collective bargaining with Local 760. Three other firms in the same area bargain separately with the same labor organization. In 1960, the collective bargaining agreements between Local 760 and the aforesaid firms expired. During negotiations for a new collective bargaining contract, Tree Fruits made certain proposals for modifications of existing terms and conditions of employment [fol. 41] which Local 760 found unacceptable. Thereafter, on August 29, 1960, Local 760 called a strike against employer-members of Tree Fruits and some other employers in the area. In December 1960, Local 760 decided, in furtherance of its continuing dispute with the aforesaid employers, to promote a consumer boycott of Washington State apples. Local 760 requested Joint Council No. 28, with which it is affiliated, to assign Joint Council organizers to assist with this program. Thereafter, the Joint Council assigned Fred Bowen, a Joint Council organizer, to work with Local 760. While so engaged on behalf of Local 760, Bowen worked under the direction and control of James Farrington, secretary-treasurer of Local 760. In late December 1960, Farrington instructed Bowen to carry out a program of picketing and handbilling at the premises of certain Safeway stores in Seattle,

Washington, which were then selling apples obtained from members of Tree Fruits.

Before the start of the picketing, Respondents gave the pickets written instructions which provided, *inter alia*:

> 3. You are not to picket in front of or in the area of any entrance to the store which is apparently set aside for the use of store employees and delivery men. As noted above, you are to limit your picketing to the consumer entrances to the store.
>
> 4. This union has no dispute with the grocery stores, and you are forbidden to make any statement to the effect that the store is unfair or on strike. You are also forbidden to request that the customers not patronize the store. We are only asking that the customers not buy Washington State apples, when they are shopping at the store.
>
> 5. Similarly, you are not to interfere with the work of any employees in the store. If you are asked by [fol. 42] these employees what the picketing is about, you are to tell them it is an advertising or consumer picket and that they should keep working. Likewise if you are asked by any truckdrivers who are making any pickups or deliveries what the picket is about, you are to advise that it is advertising or consumer picket and that it is not intended to interfere with pickups or deliveries (i. e., that they are free to go through).

The pickets or Bowen also gave each store manager a written document which recited Local 760's version of the dispute with Tree Fruits and explained the purpose and procedure of the picketing as follows:

> The strike at Yakima is still continuing and in order to win this strike, we must ask the consuming public not to purchase Washington State Apples.
>
> Therefore, we are going to place peaceful pickets at the entrances to your store for the purpose of trying to persuade the public not to buy Washington Apples. These pickets are being instructed to patrol peacefully in front of the consumer entrances of the store, to stay away from the delivery entrances and

not to interfere with the work of your employees, or with deliveries to or pickups from your store.

We do not intend that any of your employees cease work as a result of the picketing. We ask that you advise your employees of our intentions in this respect, perhaps by posting this notice on your store bulletin board.

If any of your employees should stop work as a result of our program, or if you should have any difficulties as far as pickups and deliveries are concerned or if you observe any of the pickets disobeying the instructions which they have been given, please notify the undersigned union representative at once and we will take steps to see that the situation is promptly corrected.

[fol. 43] On December 27 and 29, 1960, and on January 5, 6, 7, 12, 13, 14, 19, 20, and 21, 1961, pickets appeared at a number of Safeway stores located in and near Seattle, Washington. The pickets patrolled in front of the store premises wearing cardboard placards which stated: "TO THE CONSUMER: NON-UNION WASHINGTON STATE APPLES ARE BEING SOLD AT THIS STORE. PLEASE DO NOT PURCHASE SUCH APPLES. THANK YOU. TEAMSTERS LOCAL 760, YAKIMA, WASHINGTON." The pickets also distributed handbills which urged against the buying of Washington State apples because the 1960 crop was being packed by nonunion firms which were unfair to their employees.

Two and, in one case, three pickets appeared at store premises after the stores opened for business and left before the stores closed. The pickets walked back and forth on the sidewalks in front of the main customer entrances to the stores, giving out handbills to any persons passing by who were willing to accept them. At no time did they walk in front of store entrances used solely by the employees of the stores, or used exclusively for delivery of merchandise. At locations where stores were situated to the rear of a parking lot the pickets confined their picketing to the public sidewalk near the entrance to the parking lot.

The pickets were visible, through the windows of the stores, to some of the employees working in the stores. Some store employees used main customer entrances to the stores for ingress and egress and, in so doing, passed the pickets.

At all times, while the picketing and handbilling were being conducted, the employees of the stores continued to work in the normal way. Also, the stores continued to receive deliveries of merchandise as usual. No deliveries or pickups were stopped or interfered with and no [fol. 44] employee of Safeway or of any other employer quit work or refused to handle fruit packed by the employer-members of Tree Fruits.

At all times, the picketing and handbilling were peacefully conducted. The entrances to the stores were not blocked and ingress and egress were not interfered with.

## Discussion.

The General Counsel contends that the conduct of Respondents violated Section 8 (b) (4) (i) and (ii) (B) of the Act under the Board's decision in the *Perfection Mattress case.*[2]

1. In that case a majority of the Board held that a picket line at the premises of a secondary employer necessarily invites employees to make common cause with the picketing union and to refrain from working behind the picket line, irrespective of the literal appeal of the legends on the picket sign. Accordingly, the majority concluded that the picketing of retail stores with signs urging customers not to buy products of the primary employer constituted inducement or encouragement of employees of neutral employers within the meaning Section 8 (b) (4) (i) of the Act. The Board has reconsidered this doctrine of the *Perfection Mattress* case and a majority has now decided that picketing of a secondary employer's premises does not *per se* constitute inducement or encouragement

[2] *United Wholesale and Warehouse Employees, Local 261 (Perfection Mattress & Spring Company)*, 129 NLRB No. 125. (Member Fanning dissenting.)

of employees of neutrals within the meaning of clause (i) of Section 8 (b) (4), nor does it raise an irrebuttable presumption as to the intent or probable consequences of the picketing.[3] Whether in any given case picketing [fol. 45] is intended or calculated to "induce or encourage" employees of secondary employers to engage in a work stoppage or refusal to perform services is to be determined by all the evidence in that particular case and not by an *a priori* assumption.[4]

In the present case, all the evidence indicates that by their picketing of the Safeway stores, Respondents did not intend that employees of Safeway or of other neutral persons should engage in work stoppages; nor were cessations of work likely to occur as the result of such picketing. Thus, the picketing was confined to store customer entrances. The signs carried by the pickets were addressed specifically to consumers and urged them not to buy Washington State apples sold in the store. The handbills similarly only urged consumers not to buy such apples. Written instructions to pickets issued by Respondents cautioned the pickets to limit their picketing to consumer entrances, and not to interfere with store employees or with pickups and deliveries. The notice to store managers gave the cause of the dispute and specifically stated that it was not intendent that any employees cease work as the result of the picketing. This notice also asked store managers to report any work stoppages or difficulties with pickups or deliveries so that Local 760 could take steps to correct the situation immediately. Finally, the picketing had no effect on store employees or on employees of suppliers.

As the foregoing evidence indicates that Respondents' picketing was directed at consumers only, and was not intendent to "induce or encourage" employees of Safeway or of its suppliers to engage in any kind of action, we find that by such picketing Respondents did not violate Section 8 (b) (4) (i) (B) of the Act.

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[3] *Upholsterers Frame & Bedding Workers Twin City Local No. 61 (Minneapolis House Furnishing Company)*, 132 NLRB No. 2. (Members Rodgers and Leedom dissenting.)

[4] *Ibid.*

[fol. 46] 2. Although the picketing followed here did not violate Section 8 (b) (4) (i) (B), it did violate Section 8 (b) (4) (ii) (B). In the *Minneapolis House Furnishing* case [5] the Board unanimously reiterated that "by literal wording of the proviso [to Section 8 (b) (4)] as well as through the interpretive gloss placed thereon by its drafters, consumer picketing in front of a secondary establishment is prohibited." Such picketing "threaten[s], coerce[s], or restrain[s]" persons within the meaning of Section 8 (b) (4) (ii). And when it has for an object forcing or requiring any person to cease selling or handling the products of any other producer or processor the picketing violates Section 8 (b) (4) (ii) (B). In the present case the picketing had one of these proscribed objectives. The purpose of picketing the Safeway stores was to persuade consumers not to purchase nonunion Washington State apples which Safeway in turn purchased from members of Tree Fruits. The natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or to discontinue altogether its purchases of such apples from the struck employers. It is reasonable to infer, and we do, that Respondents intended this natural and foreseeable result. Accordingly, we find that the foregoing picketing violated Section 8 (b) (4) (ii) (B) of the Act.

We also find that both Respondents are responsible for the picketing. Local 760 decided upon the picketing and directed it. The Joint Council assigned one of its organizers, Fred Bowen, to work with Local 760 in conducting the picketing campaign. Bowen worked under the direction of Local 760's secretary-treasurer in organizing the picketing found unlawful. We therefore find that the Joint Council is equally responsible with Local 760 for [fol. 47] the unlawful picketing, either as agent of, or as joint principal with, Local 760.

IV. The effect of the unfair labor practices on commerce.

The activities of the Respondents set forth above have a close, intimate, and substantial relation to trade, traffic and commerce among the several states, and tend to

[5] *Upholsterers Frame & Bedding Workers Twin City Local No. 61 (Minneapolis House Furnishing Company)*, 132 NLRB No. 2.

lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy.

Having found that the Respondents have engaged in unfair labor practices, we shall order them to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, the Board makes the following:

Conclusions of Law.

1. Tree Fruits Labor Relations Committee, Inc., and Safeway Stores, Inc., are engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Fruit & Vegetable Packers & Warehousemen, Local 760, and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, are labor organizations within the meaning of Section 2 (5) of the Act.

3. By their consumer picketing of Safeway stores in Seattle, Washington, in furtherance of a dispute with Tree Fruits Labor Relations Committee, Inc., Respondents have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (4) (ii) (B) of the Act.

[fol. 48] 4. By the aforesaid consumer picketing of Safeway stores, Respondents have not and are not engaging in unfair labor practices within the meaning of Section 8 (b) (4) (i) (B) of the Act.

Order.

Upon the entire record in the case and pursuant to Section 10 (c) of the Act, as amended, the National Labor Relations Board hereby orders that Respondents, Fruit & Vegetable Packers & Warehousemen, Local 760, Yakima, Washington, and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, Seattle, Washington, their officers, representatives, successors, agents, and assigns, shall:

1. Cease and desist from:

(a) Threatening, coercing or restraining Safeway Stores, Inc., by picketing its retail stores, where an object thereof is to force or require Safeway Stores, Inc., to cease using, selling, handling, transporting, or otherwise dealing in apples sold by members of Tree Fruits Labor Relations Committee, Inc., or to cease doing business with such members.

2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

(a) Post copies of the attached notice marked "Appendix" [6] at their offices and meeting halls. Copies of said notice, to be furnished by the Regional Diretcor for the Nineteenth Region, shall, after being duly signed by Respondents, be posted by them immediately upon receipt [fol. 49] thereof, and be maintained by them for a period of 60 consecutive days thereafter in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken to insure that the notices are not altered, defaced, or covered by any other material.

(b) Furnish to the said Regional Director copies of the aforementioned notice for posting by Safeway Stores, Inc., the company willing, at the picketed stores.

(c) Notify the Regional Director, in writing, within 10 days from the date of this Order, as to the steps taken by Respondents to comply herewith.

It Is Further Ordered that the complaint be, and it hereby is, dismissed insofar as it alleges violations of Section 8 (b) (4) (i) (B) of the Act.

Dated, Washington, D. C. Aug. 24, 1961.

FRANK W. MCCULLOCH, Chairman,
JOHN H. FANNING, Member,
GERALD A. BROWN, Member,
National Labor Relations Board.

(Seal)

[6] In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "Pursuant to a Decision and Order" the words "Pursuant to a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX

## NOTICE.

To All Members of Fruit & Vegetable Packers & Warehousemen, Local 760, and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

Pursuant To
A Decision and Order

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify you that:

[fol. 50] We Will Not by picketing its stores, threaten, coerce, or restrain Safeway Stores, Inc., where an object thereof is to force or require Safeway Stores, Inc., to cease using, selling, handling, transporting, or otherwise dealing in the products of members of Tree Fruits Labor Relations Committee, Inc., or to cease doing business with such members.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760,
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,
(Labor Organization)

Dated ..... By .....
(Representative (Title)

[fol. 51] In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

* * * *

Case No. 16588

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, AND JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA,
PETITIONER

*vs.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—August 25, 1961

To: The United States Court of Appeals
For the District of Columbia:

This is a petition to review an order of the National Labor Relations Board, hereinafter sometimes called the "Board." The Board entered a final order by which petitioner is aggrieved and its interests adversely affected, on August 24, 1961, in a proceeding appearing and designated on the records of the Board as Fruit & Vegetable Packers & Warehousemen, Local 760, and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Tree Fruits Labor Relations Committee, Inc., Case No. 19-CC-155.

[fol. 52] The decision and order of the Board is designated as 132 NLRB No. 102.

In support of this petition, your petitioner respectfully shows to this court:

(1) That after due proceedings before the Board in conformity with procedures specified in Section 10 (b) and (c) of the National Labor Relations Act, as amended,

the Board found that the petitioner had violated Section 8 (b) (4) (ii) (B) of the National Labor Relations Act.

(2) That this court has jurisdiction over this action and the parties hereto under the provisions of Section 10 (f) of the National Labor Relations Act.

(3) The petitioner respectfully submits and contends that the Board erred in finding that the petitioner violated Section 8 (b) (4) (ii) (B) of the Act and that the order of the Board is unsupported by substantial evidence on the record considered as a whole, and is contrary to law.

(4) The petitioner respectfully prays that the order of the Board be set aside and vacated. Petitioner further prays for such other relief as may be just and proper.

Dated this 25th day of August, 1961.

DAVID LEO UELMEN,
212 West Wisconsin Avenue,
Milwaukee 3, Wisconsin,
Attorney for Petitioner.

[fol. 53] In the
UNITED STATES COURT OF APPEALS
For the
District of Columbia Circuit,

* * * *

Case No. 16588

[Title Omitted]

AMENDED PETITION TO REVIEW AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD—September 7, 1961

To: The United States Court of Appeals
for the District of Columbia:

This is a petition to review an order of the National Labor Relations Board, hereinafter sometimes called the "Board." The Board entered a final order by which petitioner is aggrieved and its interests adversely affected, on August 24, 1961, in a proceeding appearing and designated on the records of the Board as Fruit & Vegetable Packers & Warehousemen, Local 760, and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Tree Fruits Labor Relations Committee, Inc., Case No. 19-CC-155.

[fol. 54] The decision and order of the Board is designated as 132 NLRB No. 102.

In support of this petition, your petitioner respectfully shows to this Court:

(1) That after due proceedings before the Board in conformity with procedures specified in Section 10 (b) and (c) of the National Labor Relations Act, as amended, the Board found that the petitioner had violated Section 8 (b) (4) (ii) (B) of the National Labor Relations Act.

(2) That this Court has jurisdiction over this action and the parties hereto under the provisions of Section 10 (f) of the National Labor Relations Act.

(3) The petitioner respectfully submits and contends that the Board erred in finding that the petitioner violated Section 8 (b) (4) (ii) (B) of the Act and that

the order of the Board is unsupported by substantial evidence on the record considered as a whole, and is contrary to law.

(4) Section 8 (b) (4) (ii) (B) of the Act as construed by the Board in the instant proceeding is on its face and as applied in the circumstances of this case unconstitutional and void in that it abridges rights of free speech and assembly guaranteed under the First Amendment to the Constitution of the United States.

(5) The petitioner respectfully prays that the order of the Board be set aside and vacated. Petitioner further prays for such other relief as may be just and proper.

Dated this 7th day of September, 1961.

DAVID LEO UELMEN,
HUGH HAFER,
212 West Wisconsin Avenue,
Wilwaukee 3, Wisconsin,
Attorneys for Petitioner.

* * * *

[fol. 55]

IN THE UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 16,588

[Title Omitted]

ANSWER OF THE NATIONAL LABOR RELATIONS BOARD TO PETITION TO REVIEW ITS ORDER AND REQUEST FOR ENFORCEMENT OF SAID ORDER—September 18, 1961

To the Honorable, the Judges of the United States Court of Appeals for the District of Columbia Circuit:

The National Labor Relations Board, pursuant to the National Labor Relations Act, as amended (61 Stat. 136,

29 U.S.C., Secs. 151 et seq., as amended by 73 Stat. 519), files this answer to the petition to review the Board order issued against petitioners on August 22, 1961.

1. The Board admits the allegations contained in Section (1) of the petition to review.

2. The Board admits the allegations contined in Section (2) of the petition to review.

3. With respect to the allegations contained in Section (3) of the petition to review, the Board denies each and every allegation of error.

[fol. 56] 4. Further answering, the Board avers that the proceedings had before it, the findings of fact, conclusions of law, and order of the Board were and are in all respects valid and proper, and respectfully requests this Court to enter a decree enforcing said order.

5. Pursuant to Section 10 (e) and (f) of the Act, and Rule 38 (g) of this Court, the Board will certify and file with this Court a certified list of all documents, transcripts of testimony, exhibits and other material comprising the entire record of the proceedings before the Board.

Wherefore, the Board prays that the Court cause notice of filing of this Answer and request for enforcement to be served upon the petitioners, and that this Court make and enter a decree denying the petition for review and enforcing in full the Board's Order.

/s/ Marcel Mallet-Prevost,
MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

Dated at Washington, D. C., this 18th day of September, 1961.

[fol. 57]

IN THE UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 16,588

[Title Omitted]

ANSWER TO PETITION FOR ENFORCEMENT—September 22, 1961

The Petitioners, in answer to the Request for Enforcement of the National Labor Relations Board, state as follows:

1. The allegations of paragraph 4 of the Request for Enforcement are denied.

2. Petitioners affirmatively allege that

(a) The Petitioners respectfully submit and contend that the Board erred in finding that the Petitioners violated Section 8 (b) (4) (ii) (B) of the Act and that the order of the Board is unsupported by substantial evidence on the record considered as a whole, and is contrary to law.

(b) Section 8 (b) (4) (ii) (B) of the Act as construed by the Board in the instant proceeding is on its face and as applied in the circumstances of this case unconstitutional and void in that it abridges rights of free speech and assembly guaranteed under the First Amendment to the Constitution of the United States.

[fol. 58] Wherefore, the Petitioners move the Court to deny the Request for Enforcement.

Dated this 22nd day of September, 1961.

HUGH HAFER,
212 West Wisconsin Avenue,
Milwaukee 3, Wisconsin,
Attorney for Petitioners.

* * * *

IN THE UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 16,588

[Title Omitted]

Before: Edgerton, Fahy and Danaher, Circuit Judges, in Chambers.

ORDER GRANTING LEAVE TO FILE AN AMENDED PETITION TO REVIEW—October 6, 1961

Upon consideration of petitioners' motion for leave to file an amened petition for review in this case, and it appearing that no opposition has been filed and that the amended petition for review has been lodged with the clerk, it is

[fol. 59] Ordered by the court that the motion for leave to file an amended petition for review is granted and that the clerk is directed to file the petitioners' amended petition for review.

Per Curiam.

Dated: Oct. 6, 1961.

IN THE UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 16,588

[Title Omitted]

CERTIFICATE OF THE NATIONAL LABOR RELATIONS BOARD

The National Labor Relations Board, by its Executive Secretary, duly authorized by Section 102.116, Rules and Regulations of the National Labor Relations Board—Series 8, hereby certifies that the record set forth in the index attached hereto, consisting of one volume, consti-

tutes the entire record of a proceeding had before said Board and known upon its record as Case No. 19-CC-155. Such record includes the pleadings and stipulation upon which the order of the Board in said proceeding was entered, and includes also the findings and order of the Board.

[fol. 60] In Testimony Whereof, the Executive Secretary of the National Labor Relations Board, being thereunto duly authorized as aforesaid, has hereunto set his hand and affixed the seal of the National Labor Relations Board in the city of Washington, District of Columbia, this 19 day of Oct. 1961.

/s/ Ogden W. Fields,
OGDEN W. FIELDS,
Executive Secretary,
National Labor Relations Board.

(Seal)

INDEX TO THE CERTIFIED RECORD

Volume I.

1. Charge filed by Tree Fruits Labor Relations Committee, Inc., on January 9, 1961.
2. Regional Director's complaint and notice of hearing dated January 21, 1961.
3. Amended charge filed by Tree Fruits Labor Relations Committee, Inc., on February 6, 1961.
4. Regional Director's amended complaint and notice of hearing dated February 14, 1961.
5. Answer of Fruit and Vegetable Packers & Warehousemen's Local 760, to amended complaint received on February 16, 1961.
6. Answer of Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America, to amend complaint received on February 16, 1961.

7. Stipulation of facts together with exhibits attached thereto, entered into among the parties on February 23, 1961, waiving a hearing and the taking of testimony before a Trial Examiner, the making of findings of fact and [fol. 61] conclusions of law and the issuance of an Intermediate Report.

8. Copy of Order approving stipulation and transferring case to Board issued by the National Labor Relations Board on March 8, 1961.

9. Copy of Decision and Order issued by the National Labor Relations Board on August 21, 1961.

## IN THE UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

No. 16,588

[Title Omitted]

PREHEARING CONFERENCE STIPULATION—October 26, 1961

Pursuant to Rule 38 (k) of the Rules of this Court, the parties, subject to the approval of the Court, hereby stipulate as follows with respect to the issues, the dates for the filing of the briefs and joint appendix, and contents of the joint appendix.

I. The Issues.

1. Whether the Board properly concluded that the unions' picketing—which was confined to customer entrances at the stores of neutral employers and was carried on with signs addressed specifically to consumers—[fol. 62] threatened, restrained or coerced the neutral employers with an object of forcing such employers to cease doing business with the primary employer, in violation of Section 8 (b) (4) (ii) (B) of the Act.

2. Whether Section 8 (b) (4) (ii) (B) of the Act, if construed to prohibit the above-described picketing, contravenes the prohibitions of the First Amendment.

II. The Briefs and Joint Appendix.

1. The Union's brief shall be filed on or before November 27, 1961.

2. The Board's brief shall be filed on or before December 18, 1961.

3. The Union's reply brief, if any, shall be filed on or before December 28, 1961.

4. A joint appendix, to be printed by petitioners, shall be filed on or before November 27, 1961.

5. The joint appendix shall consist of:

a. Decision and Order of the Board, dated August 22, 1961, in Board Case No. 19-CC-155;

b. The "Stipulation of Facts" and exhibits attached thereto in Board Case No. 19-CC-155.

Dated at Milwaukee, Wisconsin, this 26th day of October, 1961.

HUGH HAFER,
Counsel for Petitioner Fruit & Vegetable Packers, et al.,

Dated at Washington, D. C., this 26th day of October, 1961.

MARCEL MALLET-PREVOST,
Assistant General Counsel,
National Labor Relations Board.

[fol. 63]

IN THE UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

* * * * *

No. 16,588

[Title Omitted]

Before: Bastian, Circuit Judge, in Chambers.

PREHEARING ORDER—October 27, 1961

The parties in the above entitled case having submitted their prehearing stipulation dated October 26, 1961, pursuant to Rule 38 (k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is hereby approved, and it is

Ordered that the stipulation dated October 26, 1961, shall control further proceedings in this case, and that the stipulation and this order shall be printed in the joint appendix of the parties.

Dated: Oct. 27, 1961.

[fol. 64]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 16588

[File Endorsement Omitted]

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, AND JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

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On Petition to Review and Set Aside, and on Request for Enforcement of an Order of the National Labor Relations Board

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OPINION—Decided June 7, 1962

*Mr. David Previant*, with whom *Messrs. Hugh Hafer* and *David Leo Uelmen* were on the brief, for petitioners.

*Mr. Melvin J. Welles*, Attorney, National Labor Relations Board, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Stuart Rothman*, General Counsel, *Dominick L. Manoli*, Associate General Counsel, and *Marcel Mallet-Prevost*, Assistant General Counsel, National Labor Relations Board, were on the brief, for respondent. *Mr. Morton Namrow*, Attorney, National Labor Relations Board, also entered an appearance for respondent.

[fol. 65] *Mrs. Mary Ellen Krug*, of the bar of the Supreme Court of Washington, *pro hac vice*, by special leave

of court, with whom *Mr. Warren Woods* was on the brief for Tree Fruits Labor Relations Committee, Inc., as *amicus curiae* urging affirmance.

Before EDGERTON, BAZELON and WASHINGTON, *Circuit Judges.*

BAZELON, *Circuit Judge:* This case presents a question of first impression under § 8(b)(4)(ii), a wholly new provision added by the 1959 amendments to the Taft-Hartley Act.[1] The National Labor Relations Board found that the

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[1] In relevant part, § 8(b)(4)(ii) reads:

"It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) . . . (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

* * *

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing:

* * *

". . . *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

Section 704(a) Labor Management Reporting and Disclosure Act of 1959, 73 Stat. 542, 29 U.S.C. § 158(b)(4)(ii) (Supp. III 1962).

[fol. 66] petitioner Union violated that provision by picketing the premises of retail stores to urge customers not to buy products of an employer with whom the Union had a labor dispute. The Union took care that the stores' employees continued to work and that their pick-ups and deliveries were not halted. The case is before us on the Union's petition for review and the Board's cross-petition for enforcement.

The Board proceedings were initiated upon unfair labor practice charges filed by Tree Fruits, Inc., an organization of Yakima, Washington, fresh fruit packing and warehousing companies whose employees were represented by the petitioner Union. The parties stipulated to all the facts, waived hearing before a trial examiner, and submitted the case directly to the Board.

This is the substance of the stipulation:

In August 1960, after failing to reach an agreement with Tree Fruits, the Union called a strike against its member companies. When the companies refused to yield, the Union organized a consumer boycott of the struck employers' products. In conjunction with petitioner Joint Council 28, with which the Union is affiliated, it patrolled [fol. 67] the premises of Safeway stores in Seattle, Washington, which distributed apples produced by Tree Fruits' members. The patrols consisted of two or three men or women carrying placards which bore the legend:

> TO THE CONSUMER: NON-UNION WASHINGTON STATE APPLES ARE BEING SOLD AT THIS STORE. PLEASE DO NOT PURCHASE SUCH APPLES. THANK YOU. TEAMSTERS LOCAL 760, YAKIMA, WASHINGTON.

Except where the location of stores at the rear of large parking lots prevented, members of the patrol gave customers handbills setting forth the facts of the dispute and reiterating the request that consumers not buy apples produced by Tree Fruits' members.

To prevent the picketing from inducing a work stoppage, the Union instructed the pickets to explain to any Safeway employee who might inquire that the only purpose of the picketing was to enlist the cooperation of consumers in not buying apples produced under "sweatshop"

conditions and that the employee should therefore continue to work. The pickets were also told not to patrol employee or delivery entrances, not to make any statement to the effect that Safeway was unfair or on strike, and not to request customers to refrain from otherwise patronizing the stores. All these instructions were obeyed.

The Union gave each store manager a copy of the picketing instructions and a notice informing him of the cause of the dispute and the purpose of the patrol. In addition to suggesting that the notice be posted for the benefit of Safeway employees, the Union told the managers:

> If any of your employees should stop work as a result of our program, or if you should have any difficulties as far as pickups and deliveries are concerned, or if you observe any of the pickets disobeying the instructions which they have been given, please notify the undersigned union representative at once and we will take steps to see that the situation is promptly corrected.

[fol. 68] The closing paragraph of the notice advised that if Washington State apples were not on sale at the store, the manager should notify the Union which would thereupon "transfer the patrol to another store where Washington State Apples are actually being sold." As a result of these precautions, and as the Union intended, no Safeway employee stopped work and pick-ups and deliveries at the stores were unaffected.[2]

Upon these stipulated facts the Board found that the Union had threatened, coerced, or restrained Safeway to force it to cease doing business with Tree Fruits and had thus violated § 8(b)(4)(ii)(B). The Board relied upon its earlier decision in *Upholsters Frame & Bedding Workers*, 132 N.L.R.B. No. 2 (1961). There it held that picketing the premises of a secondary employer, although addressed solely to consumers, constitutes a threat, coercion, or restraint, and is therefore *per se* an unfair labor

[2] The Board found that picketing conducted in this manner is unlikely to cause work stoppages. *Fruit & Vegetable Packers & Warehousemen Local 760*, 132 N.L.R.B. No. 102, p. 6 (1961).

practice. This view, which makes the effect of picketing immaterial, was apparently followed by the General Counsel here, for he offered no evidence concerning the impact of the picketing on Safeway's sales or its relations with the struck firms.

The Board insists and the Union denies that the statute completely bans picketing at the premises of a secondary employer. The Union argues that, since the statute makes it an unfair labor practice to "threaten, coerce or restrain any person engaged in commerce," the Board must determine from the circumstances or from the conduct of the picketing whether it is *in fact* a threat, coercion or restraint. On the other hand, the Board points out that a proviso to § 8(b)(4) exempts from the prohibition "publicity other than picketing for the purpose of truth-[fol. 69] fully advising the public . . . that a product . . . produced by an employer with whom the labor organization has a primary dispute . . . [is] distributed by another employer." The Board's argument seems to be this: The Conference Committee assumed that § 8(b)(4)(ii)(B) as it passed the House prohibited all secondary publicity as a threat, coercion or restraint. The Committee therefore added the proviso in order to exempt certain forms of publicity from that prohibition. But since secondary picketing is specifically exempted from the proviso, it remains prohibited.

In support of its position, the Board urges that the legislative history of the amendatory statute conclusively shows that Congress intended to ban all secondary consumer picketing. The Board cites, for example, the explanation made by (then) Senator Kennedy of the Conference Committee's compromise on the issue of secondary publicity. The Senate conferees, Senator Kennedy explained, insisted upon preserving certain legitimate union rights including:

> (c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor and to refrain from trading with a retailer who sells such goods.
>
> Under the [House] Landrum-Griffin bill it would have been impossible for a union to inform the cus-

> tomers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. In other words, the union can hand out handbills at the shop, can place advertisements in newspapers, can make announcements over the radio, and can carry on all publicity short of having ambulatory picketing in front of a secondary site.[3]

[fol. 70] That statement possesses much force, in light of the important role Senator Kennedy played in managing the bill. Nor can we disregard the views of other legislators who thought the statute would ban secondary consumer picketing. See 2 LEGIS. HIST. 1389, 1426-27, 1454, 1689, 1708, 1712 (1959).[4]

Looking solely to the language of the statute, however, we believe the most plausible reading to be that § 8(b)(4)(ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation "publicity other than picketing" even though it threatens, coerces or restrains an employer. For example, handbilling which has a severe economic impact on the secondary employer's business might be "coercive," but it would be exempted from regulation by the proviso. Perhaps the Board's view—that the proviso reflects the draftsman's assumption that without it all secondary pub-

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[3] 2 Legislative History of the Labor-Management Reporting and Disclosure Act 1432 (1959), cited hereinafter as LEGIS.HIST. To the same effect, see 2 LEGIS.HIST. 1388-89.

[4] See also 2 LEGIS.HIST. 1007, 1037, 1194, 1377, 1383, 1384, 1471; Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 MINN.L.REV. 257, 274 (1959); Fleming, *Title VII: The Taft-Hartley Amendments*, 54 NW.L.REV. 666, 690-91 (1960); Goldberg & Meiklejohn, *Title VII: Taft-Hartley Amendments with Emphasis on the Legislative History*, 54 NW.L.REV. 747, 757 (1960).

licity is banned because it necessarily threatens, coerces or restrains a secondary employer—can be squared with the statutory language. But that apears to be a less plausible reading of the statute.

In analyzing the legislative history, moreover, we must be ever mindful that we do a disservice to Congress if we construe the statute on the basis of the legislative history in a manner which would raise serious constitutional questions. Particularly is this so where there is no elucidating [fol. 71] House, Senate or Conference report on the precise point involved, and where one of the sponsors of the legislation made clear the desire to avoid constitutional questions. Cf. *International Ass'n of Machinists* v. *Street*, 367 U.S. 740, 765-68 (1961). Thus Representative Griffin stated:

> Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer . . . it would be covered by our bill.[5]

At the same time in referring to regulation of consumer picketing by § 8(b)(7), which was added to the Act together with § 8(b)(4)(ii), Representative Griffin further noted:

> This is subject, however, to the constitutional rights of free speech. Unless the picketing is for the coercive purpose indicated, it would not be affected by this language. In other words, whether it is the handing out handbills or putting an ad in the paper or picketing, if it is done in such a way so as clearly to be nothing more than an exercise of free speech, then the provision would not be violated.[6]

The constitutional difficulties inherent in the Board's interpretation of the statute are by no means minimal. Problems arise under the First Amendment whenever picketing is restrained. See *Thornhill* v. *Alabama*, 310

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[5] 2, LEGIS. HIST. 1615.

[6] *Ibid.*

U.S. 88 (1940). See also *National Labor Relations Board* v. *Drivers' Local*, 362 U.S. 274, 284 (1960). This is because picketing combines constitutionally protected speech for the purpose of communicating ideas with a "signal" to act which must yield to the states' power "to set the limits of permissible contest open to industrial combatants." *Giboney* v. *Empire Storage Co.*, 336 U.S. 490, 499 (1949). See *Brotherhood of Teamsters* v. *Vogt*, 354 U.S. 284 (1957).

[fol. 72] Mr. Justice Douglas has explained in an oft-cited concurring opinion why picketing is more than speech: "Picketing by an organized group is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the ideas which are disseminated. Hence those aspects of picketing make it the subject of restrictive regulation." *Bakery & Pastry Drivers & Helpers Local* v. *Wohl*, 315 U.S. 769, 776-77 (1942) (Douglas, J., concurring).

The response to which Mr. Justice Douglas referred is characteristic of unionized employees to whom pickets have traditionally addressed their appeal. Such employees are subject to group discipline based on common interests and loyalties, habit, fear of social ostracism, or the application of severe economic sanctions. Hence, they may refuse to work or to make pickups and deliveries for a secondary employer, thereby causing him serious and immediate economic injury. See Cox, *Strikes, Picketing and The Constitution*, 4 VAND.L.REV. 574, 594 (1951). In that context, picketing is more than "pure" speech.

In this case, however, the Union sought to enlist the support of members of the public at large and successfully sought to *prevent* its picketing from having the customary "signal" effect on employees. Each prospective patron could read the Union's signs and literature and determine, in the light of his own interests and convictions, what course he would follow. And, as we have pointed out, the record does not show any injury to Safeway, the secondary employer. Indeed, Tree Fruits, not Safeway, is the charging party here. Thus it may well be that the picketing in this case is closer to the core notion

of constitutionally protected free speech than the picketing the Supreme Court has held may be banned.[7]

[fol. 73] It should be borne in mind that this type of "do not patronize" appeal to the general public by peaceful pickets is not restricted to labor unions. Picket lines have been used to voice objection and effect changes in the policies of business enterprises which discriminate between races,[8] purvey objectionable films, remain open on Sunday,[9] purchase materials abroad—whether from friend or foe—and distribute products deemed harmful or immoral.

It is true that even if picketing is in a given case "pure speech," this does not bar Congress or the states from prohibiting such appeals in all circumstances. Cf. *Hughes* v. *Superior Court*, 339 U.S. 460 (1950). Statutes infringing upon free speech are enforceable if the gravity of the evil the legislature seeks to prevent, discounted by its improbability, justifies the infringement.[10] But in the absence of a showing that a substantial economic impact on the secondary employer has occurred or is likely to occur, we would be hard-put to find a constitutional justification for prohibiting a union from using picketing as the form of making "do not patronize" appeals, so long as the picketing is conducted in an entirely peaceful and non-coercive manner, is addressed solely to consumers, and has no side effects which might be a basis for distinguishing it from any other form of publicity. Cf. *Lebus* v. *Building Trades Council*, 199 F. Supp 628 (E.D. La. 1961).[11]

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[7] See generally Samoff, *Picketing and the First Amendment: "Full Circle" and "Formal Surrender,"* 9 LAB.L.J. 889 (1958); Note, 107 U.PA.L.REV. 127 (1958).

[8] *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U.S. 552 (1938).

[9] *Ex Parte Lyons*, 28 Cal.App.2d 293, 81 P.2d 190 (1938).

[10] *Dennis* v. *United States*, 341 U.S. 494, 510 (1951). See *Whitney* v. *California*, 274 U.S. 357, 372, 374, 377 (1927) (concurring opinion of Brandeis, J.). *See generally* Richardson, *Freedom of Expression and the Function of Courts*, 65 HARV.L.REV. 1 (1952).

[11] We do not reach the question of what "side effects" might be sufficient to remove picketing from the category of pure speech. The Board has construed the statute to permit unions to organ-

[fol. 74] We are thus constrained, in reading the statute and its legislative history, to accord proper weight to the cases which teach that when two interpretations are possible, courts must construe a statute narrowly to avoid reaching constitutional issues. We must also give full consideration to the stated desire of key legislators to avoid constitutional encroachments.

Viewed as a whole, the statute does not reflect Congress' intent to ban all secondary consumer picketing. What Congress has said is that it shall be an unfair labor practice for a union "to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is . . . forcing or requiring any person to cease . . . selling . . . the products of any other producer . . . ." Each of these terms has a meaning; each must be given effect. None can be ignored or repealed by reference to the legislative history. It is significant that when Congress wanted to outlaw picketing *per se*, it knew [fol. 75] how to do so, as is evidenced by § 8(b) (7), which forbids a union in certain circumstances "to picket or cause to be picketed any employer" if its object is to force him to recognize an uncertified union.

As we construe the statute, it condemns not picketing as such, but the use of threats, coercion and restraint to achieve specified objectives. Some picketing might come within the ambit of that prohibition. But here, there was no work stoppage, no interruption of deliveries, no vio-

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ize consumer boycotts by means "other than picketing." *American Fed'n of T. V. and Radio Artists*, 134 N.L.R.B. No. 141 (Dec. 27, 1961). See *Local 154, Internat'l Typographical Union*, 135 N.L.R.B. No. 96 (Feb. 13, 1962); *Local 142 Plumbers Union*, 135 N.L.R.B. No. 33 (Sept. 22, 1961). The questions arise whether the consumer boycott can be said, in light of Congress' tolerance of it, to be an evil of sufficient gravity to justify complete suppression of picketing, *cf. American Communications Ass'n* v. *Douds*, 339 U.S. 382, 400-01 (1950); *Dennis* v. *United States*, *supra* note 9, or whether the explicit exemption of other forms of communication from the reach of the statute saves its constitutionality. *Cf. Poulos* v. *New Hampshire*, 345 U.S. 395 (1953). See also *Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949); *Central Lumber Co.* v. *South Dakota*, 226 U.S. 157, 160 (1912). These questions are not now before us, however, and we do not decide them.

lence or threat of violence. The record does not show whether pickets "confronted" consumers or whether consumers felt "coerced' by their presence. Nor does the record show that the picketing—directed against only one of hundreds of products sold by Safeway—caused or was likely to cause substantial economic injury.

Since the Board proceeded on the erroneous premise that the statute completely bans consumer picketing at the premises of a secondary employer, we remand the case to the Board for further proceedings consistent with this opinion. Under that remand the Board is free to reopen the record to receive evidence upon the issue whether Safeway was in fact threatened, coerced, or restrained.[12]

*Reversed and remanded.*

[12] See *National Labor Relations Board* v. *Katz*, 289 F.2d 700, 709 (2d Cir. 1961); *National Labor Relations Board* v. *Cambria Clay Prod. Co.*, 215 F.2d 48 (6th Cir. 1954); *National Labor Relations Board* v. *Electronics Equip. Co.*, 194 F.2d 650 (2d Cir. 1952).

[fol. 76]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,588

FRUIT AND VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, AND JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

[File Endorsement Omitted]

On Petition to Review and Set Aside, and on Request for Enforcement of, an order of the National Labor Relations Board.

Before: Edgerton, Bazelon and Washington, Circuit Judges.

JUDGMENT—June 7, 1962

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and set aside, and a request for enforcement of, the order of the National Labor Relations Board herein, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the National Labor Relations Board on review in this case is set aside, and this case is hereby remanded to the Board for further proceedings consistent with the opinion of this court.

Per Circuit Judge Bazelon.

Dated: June 7, 1962.

[fol. 77]

[Petition for rehearing covering 12 pages filed June 15, 1962 omitted from this print. It was denied, and nothing more by order October 12, 1962]

[fols. 78-87] * * *

[fol. 88]

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

* * * *

No. 16,588

[Title Omitted]

[File Endorsement Omitted]

Before: Bazelon, Chief Judge, and Edgerton and Washington, Circuit Judges, in Chambers.

ORDER DENYING PETITION FOR REHEARING—October 12, 1962

On consideration of respondent's petition for rehearing, it is

ORDERED by the court that the petition is hereby denied.

Per Curiam.

[fols. 89-90] * * *

[fol. 91]

[Clerk's Certificate to foregoing transcript omitted in printing.]

[fol. 92]

SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1962

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*vs.*

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, AND JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA.

---

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—January 9, 1963

---

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 11th, 1963.

/s/ Earl Warren
*Chief Justice of the United States.*

Dated this 9th day of January, 1963.

[fol. 93]

SUPREME COURT OF THE UNITED STATES

No. 921, October Term, 1962

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*vs.*

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, ET AL.

ORDER ALLOWING CERTIORARI—June 10, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and a total of one and one-half hours is allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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No. 88

# In the Supreme Court of the United States

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, and JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*.

## BRIEF OF CHARGING PARTY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 921

# In the Supreme Court of the United States

OCTOBER TERM, 1962

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

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In the
# Supreme Court of the United States

OCTOBER TERM, 1962

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, and JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*.

No. 921

## BRIEF OF CHARGING PARTY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

By letters dated April 29, 1963 and May 3, 1963, from the Clerk of this court, counsel for the charging party were invited to submit a brief in support of the petition for certiorari filed in this case by the National Labor Relations Board. They are grateful for this opportunity because they believe the questions presented by the petition to be of sufficient national interest to warrant granting the petition.

### OPINIONS BELOW

The opinion of the Court of Appeals (App. A of Petition, pp. 19-31) is reported at 308 F.2d 311. The findings of fact, conclusions of law and order of the Board (R. 38-50)[1] are reported at 132 NLRB 1172.

[1] "R" refers to the joint appendix filed in the court below.

## JURISDICTION

The jurisdictional facts are correctly set out on page 2 of the Petition.

## QUESTION PRESENTED

The question presented by the Petition is well stated on page 2 of the Petition and is repeated here in *haec verba* for the sake of continuity and convenience.

> "Section 8(b) (4) (ii) (B) of the National Labor Relations Act, as amended, makes it an unfair labor practice for a labor organization 'to threaten, coerce, or restrain any person,' where an object is to force him to cease doing business with another person. A proviso excepts 'publicity, other than picketing * * * as long as such publicity does not have an effect' on deliveries.
>
> "The question presented is whether picketing at a retail store, urging customers of the store not to purchase products which the store has obtained from an employer with whom the union has a primary dispute, constitutes a 'threat, coercion or restraint' within the meaning of this section, absent a showing that the picketing in fact inflicted any economic injury upon the store."

## STATUTE INVOLVED

The statute involved is the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) the pertinent provisions of which are set forth in Appendix A of this brief.

## STATEMENT OF THE CASE

The charging party adopts the statement of facts in the Petition.

### A. Board's Conclusion and Order

On August 24, 1961, the Board entered a decision and order finding that the Union had committed an unfair

labor practice within the meaning of Section 8 (b) (4) (ii) (B) of the Act (R. 38), and ordered the Union to cease and desist from this practice (R. 48). This order was based on the Board's conclusion that picketing Safeway Stores for the purpose of forcing Safeway Stores to cease doing business with the Tree Fruits employers was a "threat, coercion or restraint" within the meaning of Section 8(b)(4)(ii)(B), and hence, an unfair labor practice within the cited section of the Act.

**B. Decision of Court of Appeals**

As pointed out by Petitioner, the Court of Appeals set aside the Board's order, and remanded the case to the Board for further proceedings.

The Court of Appeals acknowledged that the legislative history of the statute tended to support the Board's construction of it, but thought that the language of the statute did not sustain the Board's construction. The Court of Appeals concluded "... the most plausible reading to be that § 8 (b) (4) (ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation 'publicity other than picketing' even though it threatens, coerces or restrains an employer" (Petitioner's App. A. p. 25).

This reading of the statute requires the Board to look to the *effect* of the picketing on the secondary employer, as the Court of Appeals invited the Board to do in this case, in order to find a violation of the statute.

The court feared lest the Board's reading of the

statute, whereby the Board need look only to the conduct and the object of the conduct, and not attempt to measure the effect of the conduct, would raise constitutional difficulties "by no means minimal," and which the court "would be hard-put" to resolve in favor of constitutionality (R. 27, 29).

## REASONS FOR GRANTING THE WRIT

### A. The Issue Is of National Importance

This is the first case to reach this court involving the Landrum-Griffin amendments to the National Labor Relations Act, and squarely presents an issue of interpretation of the secondary boycott section, 8 (b) (4) (ii) (B), which is of paramount importance to industry and labor in knowing what conduct is lawful and what is not, as well as being an issue of importance in the administration of the Act.

The extent of the Congressional debate over this section indicates the importance attached to the secondary boycott problem by industry and labor and the careful consideration bestowed on it by the members of both houses of Congress and the conference committee.

The message of the President of the United States, delivered January 28, 1959, Transmitting a 20 Point Program to Eliminate Abuses and Improper Practices in Labor-Management Relations, cited the need for federal legislation "to protect the public and innocent third parties from unfair and coercive practices, such as boycotting and blackmail picketing." The President said:

> "I recommend legislation—
>
> * * * To amend the secondary boycott provisions of the National Labor Relations Act so as to cover

the direct coercion of employers to cease or agree to cease doing business with other persons; union pressures directed against secondary employers not otherwise subject to the act * * *." (I Legis. Hist. p. 81-82)

Secondary boycott prohibitions were the subject of Section 503 of Senate Bill 748, I Legis. Hist. 142; H.R. Bill 4474, I Legis. Hist. 254; Senate Bill 1384, I Legis. Hist. 327; H.R. 7265, I Legis. Hist. 595; and H.R. 8400, I Legis. Hist. 681.

Senate Report No. 187 on Senate Bill 1555, the Kennedy-Ervin bill relating to regulation of union funds promoting union democracy, clarifying the "no man's land," and curbing activities of middlemen, but containing no amendments to the unfair labor practice section of the Taft-Hartley Act, included minority views which ultimately prevailed in the Congress. These minority views included the following:

"The records of the National Labor Relations Board show that from the enactment of Taft-Hartley in 1947 until the present, 34 per cent of the secondary boycott cases coming to the Board involve the Teamsters Union which represents about 10 per cent of all of the members of organized labor. Thus, the figures demonstrate, that like minority picketing, the secondary boycott is a favorite device of the Teamsters, and is used by them at least three and one-half times as frequently as it is by any of the rest of the labor movement.

[Here the Teamsters are again, the respondents in the instant case.]

"The basic justification for banning secondary boycotts is to protect genuinely neutral employers

and their employees, not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer. * * *

"The major loopholes in the present ban on secondary boycotts are:

"(1) *Coercion of employers*—Present law makes it an unfair labor practice for a union or its agents to urge the employees of an employer to refuse to perform work for the purpose of compelling their employer to cease doing business with some other person. This provides the biggest loophole in present law. The prohibition is against the threatening or urging of the 'employees' of the other employer. Nothing is said about urging or persuading the employer of the secondary employees. Thus a union having a dispute with or attempting to organize the employees of employer A can go directly to employer B, who either uses employer A's products or supplies employer A with raw materials, and threaten employer B with a strike or picket line if he continues to do business with employer A. If the union happens to be the bargaining agent for the employees of B, it takes little persuasion of B to get him to stop doing business with A. B does not want trouble with the union with which he has a contract and anyway A is only one of his many suppliers or customers. So B readily succumbs to the union pressure and tells A he no longer wishes A's products or will no longer supply raw materials to A, and in so doing no one has violated present law. But look at the situation of employer A. Perhaps B is his primary customer or supplier. His alternative is to yield entirely to the union's demands, force his employees to join the union, or go out of business. Countless examples

of actual cases corresponding to this hypothetical have been presented to congressional committees in various hearings since 1947.

> "The bill, S. 748, meets this problem by amending section 8 (b) (4) of the present law to make the restriction apply to 'threaten, coerce, or restrain any person engaged in commerce * * * ' as well as 'induce or encourage any individual employed by any person.' " (I Legis. Hist. 474-475)

Secondary boycotts were the subject of debate on over thirty occasions in the two houses of Congress as shown by the index to the Legislative History, Page XXIII.

The consumer picketing which is the subject of this case, was specifically considered often and at length by the Congress and was one of the largest "loopholes" in the Taft-Hartley Act, which Congress sought to close.

Significantly, the court below has adopted an interpretation of the statutory language which is entirely different from that accorded the language by both the proponents and opponents.

Thus, Senator John L. McClellan, a proponent of the legislation, said:

> " * * * In other words, if there were a strike in a certain plant, and I, as a merchant, handled the products of that plant, under the amendment the union could not use picketing to try to compel me to cease handling the products of the plant where the labor dispute is under way. * * * " (II Legis. Hist. 1193(3).)

Senator Wayne L. Morse, member of the Senate Committee on Labor and Public Welfare, an opponent of the legislation, said:

"* * * This bill does not stop with threats and with illegalizing the hot cargo agreement. It also makes it illegal for a union to 'coerce, or restrain.' This prohibits consumer picketing. What is consumer picketing? A shoe manufacturer sells his product through a department store. The employees of the shoe manufacturer go on strike for higher wages. The employees, in addition to picketing the manufacturer, also picket at the premises of the department store with a sign saying 'Do not buy X shoes'. This is consumer picketing, an appeal to the public not to buy the product of a struck manufacturer. * * *" (II Legis. Hist. 1426(3))

Senator Barry M. Goldwater, member of the Senate Committee on Labor and Public Welfare, and a proponent of the legislation, said in two extensions of his remarks in the Congressional Record:

"* * * But let me give you a variation that is not prohibited under the Taft-Hartley Act.

"Take the same set of facts. The union has a dispute with Employer A. Employer A does business with Employer B. Instead of throwing a picket line around Employer B, the business agent of the union goes directly to Employer B himself in his office and says, 'Unless you stop doing business with Employer A, we will throw a picket line around your plant.' That's not illegal under present law, because there the inducement to cease doing business is made directly upon the secondary employer and not through his employees. Now that would be illegal under the new bill.

"Question: That was a loophole in the old law?

"Answer: Right." (II Legis. Hist. 1829(1))

"* * * This new amendment in the conference

> report also makes secondary consumer boycotts illegal subject to certain narrow and limited exceptions. Thus, under previous law a labor union having a dispute with the producer, company A, could lawfully picket the distributor, company B, who carried company A's products for sale, for the purpose of inducing consumers not to patronize company B, subject to certain restrictions imposed by the Board. Under the new amendment, such picketing becomes illegal, but the union is permitted to engage in publicity—by means other than picketing—truthfully advising the public that company B the distributor—the secondary employer—is distributing goods produced by Company A, the producer with whom such labor union has a primary dispute. * * *" (II Legis. Hist. 1857(2))

Senator Paul Douglas, an opponent of the legislation, did not construe the effect of the language any differently, II Legis. Hist. 1833 (1).

At no point in the debates was it even suggested that the *effect* of the picketing need be assessed before its *legality* could be determined.

On the contrary, opponents and proponents alike were of the opinion that the language of the amendment would require the Board to look to two factors only, objects and means. If (1) the object was to compel the secondary employer to cease doing business with the primary employer, and (2) the means used was picketing or other threats, coercion or restraint, save only publicity other than picketing, the conduct was unlawful, and the Board was not only to order the union to cease and desist from it, Section 10 (c), but

to ask the district court to enjoin it, Section 10 (1) (Pertinent portions are set forth in Appendix A of this brief).

Thus Representative John A. Lafore, Jr., a member of the House Committee on Education and Labor, said:

> "* * * Another similar insidious variety is secondary consumer boycott. Under the present law a union can apparently picket the customer entrances of a retail store which is carrying a product manufactured by a company with which a union has a primary dispute. Similarly a union can organize a consumer or customer boycott against a distributing firm merely because that company advertises on a radio or television station or in a newspaper with which the union has a primary dispute. Sponsors of radio and TV programs and advertisers in newspapers are threatened with economic pressure and a loss of business by the union unless they discontinue their advertising. These are examples of secondary or consumer boycotts, a potent form of economic pressure that are intended to be made unlawful by the language of my bill." (II Legis. Hist. 1471(1)(2))

The decision of the Court of Appeals in its reading of the statutory language is in conflict with the reading of the language by the proponents and opponents in Congress, the agency charged with the administration of the Act, and also with decisions of the district courts. *Penello v. Teamsters, Local 557* (D.C., Md., 1962) 45 Labor Cases ¶ 17,657; *Cuneo v. Carpenters Local No. 15* (D.C., N.J., 1961) 197 F.Supp. 662.

### B. The Court of Appeals Overlooked Significant Statutory Language

The Court of Appeals failed to take any cognizance at all of the proviso to subsection (B) which reads:

> "Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

So much attention has been focused on the last proviso to section 8(b)(4), which specifically refers to consumers, that the proviso to subsection (B) which specifically refers to picketing, has been largely passed over, but the proviso to subsection (B) is dispositive of the question of whether or not peaceful picketing, without more, is comprised within the terms, "threaten, coerce or restrain," and disposes of that question in the affirmative. The proviso makes crystal clear that secondary strikes and secondary picketing, *secondary only*, fall within the ban of the statute.

The language of section 8(b)(ii)(B) without the proviso was originally embodied in S.B. 1384 introduced by Senator McClellan, I Legis. History 327, 328. In the original Landrum-Griffin Bill, H.R. 8400, the same text appeared without the proviso, I Legis. Hist. 619, 681. The proviso was added by the House and Senate conferees. Mr. Griffin, as one of the House conferees, submitted a preliminary conference report including a table entitled, "Summary analysis of conference agreement as to Title VII — Taft-Hartley amendments." This table included the following:

| III. Other secondary boycotts | *House Bill (Landrum-Griffin)* | *Senate Bill (Kennedy-Ervin)* | *Conference Agreement* |
|---|---|---|---|
| | • • • | • • • | • • • |
| | 4. Prohibits secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute. | ——do—— | Adopt House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott. II Legis. Hist. p. 1712. |

Mr. Frank Thompson, Jr., of New Jersey, a member of the conference committee, speaking in support of the conference report, said in part:

> "Employees will also be entitled to publicize, without picketing, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute." II Legis. Hist. p. 1720.

Similarly, Mr. Roland V. Libonati of Illinois, speaking against the conference report, said:

> "Unions can only advertise against an establishment selling unfair goods. Picket lines are illegal where there is no primary dispute." II Legis. Hist. p. 1734.

Had "picketing" not been understood to be included in the terms "threaten, coerce or restrain," this proviso to subsection (B) would have been meaningless. Picketing which is not peaceful is unlawful whether at a primary or secondary site. Picketing "not otherwise unlawful" is necessarily peaceful. The proviso draws peaceful *primary* picketing from the ban of the

statute, leaving *secondary* picketing, however peaceful, banned.

### C. The Decision Will Affect the Construction and Application of All of Section 8(b)(4)(ii)

The application to subsections (A), (C) and (D) of the court's holding that the effect of the picketing must be considered to find a violation of § 8(b)(4)(ii) would be inevitable, if the decision were allowed to stand, and would lead to absurd results.

If peaceful picketing is not included within the words "threaten, coerce, or restrain," unless the picketing adversely affects the secondary employer's business, it must follow that section 8(b)(4)(ii)(A) is not violated by picketing where an object thereof is forcing or requiring any employer or self-employed person to join any labor or employer organization, unless the self-employed person or employer actually joins the labor or employer organization or can prove economic injury from the picketing.

Likewise, picketing where an object thereof is (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees when another labor organization has been certified as the representative of such employees, would not be unlawful unless the employer yielded to the prohibited objective or suffered economic hardship as a result of the picketing..

Similarly, in the case of picketing (D) to force or require an employer to assign particular work to employees in a particular labor organization, the Board

would have to assess the effect of the picketing before it could order it stopped.

Thus the decision of the court of appeals affects not only the interpretation, application and administration of subsection (B) of section 8(b)(4)(ii), but all of 8(b)(4)(ii), because, what the court has held is, that conduct, unlawful intent and unlawful objective do not equal an unfair labor practice, but that the actual effect of the conduct must be assessed to determine whether or not the conduct constitutes a threat, coercion or restraint.

Section 8(b)(4)(ii) has never been so construed.

Such a reading of Section 8(b)(4)(ii) is inconsistent with the reading given by the Board and the courts, including the United States Court of Appeals for the District of Columbia. *Sheet Metal Workers v. NLRB* (CA-D.C., 1961) 293 F.2d 141; *NLRB v. United Construction Workers* (CA-4, 1952) 198 F.2d 391; *Printing Specialties & Paper Converters Union v. LeBaron* (CA-9, 1948) 171 F.2d 331; *NLRB v. Garment Workers Local 155* (CA-2, 1959) 267 F.2d 916. In the last cited case the Court of Appeals for the Second Circuit said of Section 8(b)(4)(i) in part:

> "It has long been recognized that picketing in labor disputes often contains elements both of persuasion and of coercion. *Insofar as picketing is free from coercive intent or effect, Congress has declared that it shall not be the basis for a finding of an unfair labor practice;* and perhaps the declaration is necessary, if the Act is to avoid the First Amendment's imperative. 29 U.S.C.A. § 158(c); see *International Brotherhood of Electrical Work-*

> *ers, Local 501, AFL v. N.L.R.B.*, 341 U.S. 694, 71 S.Ct. 954, 95 L.Ed. 1299. Nor is picketing unfair, under the Act, merely because it is shown to be coercive in effect; the tests set forth in the Act must be met. See *Garner v. Teamsters, etc.*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228. To render the union's activities illegal under § 8(b)(4)(C), two elements must concur: the labor organization must be inducing employees to strike or to engage in a concerted refusal to work; and an object of the union's activities must be its recognition by the employer as the representative of its employees, where another union has been certified by the Board." (267 F.2d 919) (Emphasis supplied)

In the above cited cases evidence of the *effect* of picketing has been considered for the purpose of shedding light on the *intent* of the picketing, but the effect has never been considered an *element* of the unfair practice.

In the instant case the *intent* of the picketing is not in dispute. Exhibit 6, the notice to store manager and store employees made the intent of the picketing as clear as it could be made, by stating in part:

> "As noted above, our information indicates that you are presently selling Washington State Apples. If, however, this information is not correct and you are selling apples exclusively from another state, please notify the undersigned and we will see that the pickets are transferred to another store where Washington State Apples are actually being sold." (R. 33-34)

*No more direct or lucid statement could be made that the store would be picketed until it stopped selling the apples.*

### D. The Court Was Beguiled by Irrelevancies

The court's observation that it is Tree Fruits, not Safeway, which is the charging party points to an academic and theoretical approach to the issue, rather than the practical approach sought by the Congress.

Section 10(b) of the Act does not require that the charge be filed by the real party in interest, but a charge may be filed by anyone. The Rules and Regulations of the Board, section 102.9, provide:

> "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person."

Were it incumbent on retailers to file charges against consumer boycott activity, the time, expense, trouble and danger of involving itself in someone's else's quarrel would render submission the only practical course, and the Congressional intent of prohibiting such involvement would be thwarted.

### E. The Court's Constitutional Reservations Would Severely Hamper Congress in Keeping the Channels of Interstate Commerce Open

If the Board's reading of the statutory language raises constitutional questions, those questions should be squarely faced. That the court misconstrued *Hughes v. Superior Court*, 339 U.S. 460, and *Brotherhood of Teamsters v. Vogt*, 354 U.S. 284 (1957) has been pointed out by the Board in its Petition at pages 13-14.

The court, however, also misconstrued the statutory history with reference to the relation of the statutory language and the constitutional requirement of free speech. The court quoted Mr. Griffin's remarks on free

speech in the course of its opinion, but quoted them out of context. (See App. A to Board's Petition, p. 26.) The colloquies from which the court extracted its excerpts are reprinted in full in Appendix B to this brief. They make it abundantly clear that all secondary picketing was intended to be banned and all non-picketing avenues of publicity were to be left open under the terms of the second proviso to Section 8(b)(4).

The court attempted to distinguish *Bakery & Pastry Drivers & Helpers Local v. Wohl*, 315 U.S. 769 (1942) by pointing out that in the instant case the Union was appealing to members of the public at large and sought to prevent "its picketing from having the customary 'signal' effect on employees" (Appendix A to Board's Petition, p. 28).

The court overlooked the difference between clauses (i) and (ii). Clause (i) makes it an unfair labor practice to induce or encourage *any individual employed* by any person, etc. for the four proscribed purposes. Clause (ii) makes it an unfair labor practice to threaten, coerce, or restrain *any person* for the four proscribed purposes. Thus the "signal" need not even be directed at employees to run afoul of clause (ii). Flashing the *picket* signal *at any person*, other than a *primary* employer, for any of the four proscribed objectives is prohibited. The effect or intended effect on *employees* is irrelevant to a charge under clause (ii).

The fact that picket lines have been used by others than labor organizations is certainly irrelevant. The statute does not proscribe or affect picketing generally, or subject it to criminal penalties under any circum-

stance. The statute merely declares it to be an unfair labor practice for a *labor organization* to threaten, coerce or restrain *any person* for four proscribed objectives, provided that *primary* picketing, not otherwise unlawful, is not rendered unlawful by this section.

To hold that Congress cannot constitutionally so restrict the use of the picket "signal," is novel doctrine indeed.

## CONCLUSION

In view of the far-reaching consequences of allowing the decision of the court below to stand, and the uncertainty as to the law it will engender for labor, management and the enforcing agency, as well as the conflict between circuits which will arise if the Court of Appeals for the Fifth Circuit enforces the Board's order in *Perfection Mattress & Spring Co.*, 129 NLRB 1014, pending on petitions for review and enforcement in that court, Nos. 18748, 19080, 19162, the Petition for Certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

### (Title 29, U.S.C.A. § 158 (b))

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to enter into any agreement which is prohibited by subsection (e) of this section;

"(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

"(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work;

"*Provided,* That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engage in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this subchapter: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport

any goods, or not to perform any services, at the establishment of the employer engaged in such distribution."

**(Title 29, U.S.C.A. § 160 (b), (c) and (l))**

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * *

"(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such a person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: * * *

"(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158 (b) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after

such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. * * * "

## APPENDIX B

### (II Legis. Hist. 1615 (1-3)

Mr. Brown of Ohio —

Mr. Chairman, I should like to propound a question either to Mr. Griffin or to Mr. Landrum, the authors of one of the bills, relative to secondary boycotts. If I understood their testimony before the Committee on Rules correctly, the authors of this bill stated their bill will deal properly with secondary boycotts.

My question concerns the picketing of customer entrances to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentleman's bill?

Mr. Griffin —

Let us take for example the case that the President talked about in his recent radio address. A few newspapers reported that the secondary boycott described by the President would be prohibited under the present act. It will be recalled that the case involved a dispute with a company that manufactured furniture. Let us understand that we are not considering, as I understand your question, the right to picket at the manufacturing plant where the dispute exists.

Mr. Brown of Ohio —

That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.

Mr. Griffin —

Then, we are not talking about picketing at the place of the primary dispute. We are concerned about

picketing at a store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law because of technical interpretations, the boycott would not be covered.

Mr. Brown of Ohio —

In other words, the Taft-Hartley Act does not cover such a situation now?

Mr. Griffin—The way it has been interpreted.

Mr. Brown—But the Griffin-Landrum bill would?

Mr. Griffin—Our bill would; that it right. If the purpose of the picketing is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.

Mr. Brown of Ohio—Not to sell the goods of some concern that is on strike. Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

Mr. Griffin—Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer

not to do business with the manufacturer, whether it is plumbing—

Mr. Brown of Ohio—Advertising.

Mr. Griffin—Advertising, or anything else, it would be covered by our bill. It is not covered now. * * *

Mr. Gubser—Mr. Chairman, I should like to ask the coauthor of the Landrum-Griffin bill a question which follows along the lines of the questioning of the gentleman from Ohio (Mr. Brown). Specifically, under the Griffin-Landrum bill, let us say there is a picket in front of a business establishment, and he carries a sign, "This establishment is not affiliated with the AFL." Could that be accomplished legally under the Griffin-Landrum bill?

Mr. Griffin—*First of all I assume the gentleman is talking about primary picketing. We are not talking about a secondary boycott in this situation?*

Mr. Gubser—That is right.

Mr. Griffin — We must look to the purpose of the picketing in the particular situation. Under H.R. 8400, looking at page 66, it provides that where an object of the picketing is to force or require employees to accept or select such labor organization as their bargaining agent, then the picketing in that case would be illegal unless the union can show that at least 3 out of 10 of the employees are interested in the union. This is subject, however, to the constitutional right of free speech. *Unless the picketing is for the coercive purpose indicated it would not be affected by this language.* In other words, whether it is the handing out handbills or put-

ting an ad in the paper or picketing, if it is done in such a way so as clearly to be nothing more than an exercise of free speech, then the provision would not be violated. (Emphasis supplied)

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No. [illegible] 88

IN THE

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, and JOINT COUNCIL NO. 28 OF THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA.

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

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No. 921.

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## RESPONSE TO PETITION FOR WRIT OF CERTIORARI.

Pursuant to the Court's request, Respondents submit the following statement in response to the Petition for Writ of Certiorari previously filed in this case.

## QUESTION PRESENTED.

The question presented as stated in the Petition for Writ of Certiorari suggests that issue is one of statutory construction and nothing more. Respondents respectfully submit that there is in addition the following question presented:

Whether peaceful picketing at a retail store, urging customers of the store not to purchase products which the store has obtained from an employer with whom the Union has a primary dispute, is protected under the First Amendment to the Federal Constitution where, as here, the picketing is devoid of "signal" content.

## STATEMENT.

The National Labor Relations Board has stated in two cases that it considers the decision below to be erroneous and accordingly, the Board has, in such cases, adhered to the view expressed by it in the present case. **Colony Liquor Distributors, Inc.**, 140 NLRB No. 105; **Typographical Union—(General Motors Corp.)**, 141 NLRB No. 108, Note 5. In view of the Board's stated intention to adhere in future, similar cases to its construction of the Act in the present case, Respondents do not oppose granting the Petition for Writ of Certiorari.

Respectfully submitted,

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## BRIEF OF TREE FRUITS LABOR RELATIONS COMMITTEE, INC., *Amicus Curiae*.

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NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, and JOINT COUNCIL No. 28 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*.

## BRIEF OF TREE FRUITS LABOR RELATIONS COMMITTEE, INC., *Amicus Curiae*.


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# In the
# Supreme Court of the United States

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, and JOINT COUNCIL No. 28 of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Respondents*.

No. 68

## BRIEF OF TREE FRUITS LABOR RELATIONS COMMITTEE, INC., *Amicus Curiae*.

### OPINIONS BELOW

The opinion of the Court of Appeals (R. 56-66) is reported at 308 F.2d 311. The findings of fact, conclusions of law and order of the Board (R. 34-44) are reported at 132 NLRB 1172.

### QUESTION PRESENTED

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, makes it an unfair labor practice for a labor organization "to threaten, coerce, or restrain any person," where an object is to force him to cease doing business with another person, provided that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing. A proviso modifying all of subsection

(4) excepts in certain situations "publicity, other than picketing * * * as long as such publicity does not have an effect on deliveries.

The question presented is whether picketing at a retail store, urging customers of the store not to purchase products which the store has obtained from an employer with whom the union has a primary dispute, constitutes a "threat, coercion or restraint" within the meaning of this section, absent a showing that the picketing in fact inflicted any economic injury upon the store.

## STATUTE INVOLVED

The statute involved is the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.*) the pertinent provisions of which are set forth in Appendix A of this brief.

## INTEREST OF AMICUS CURIAE

The *Amicus Curiae* is the charging party in the proceeding before the National Labor Relations Board which is the subject of the instant case, and is the employer and primary party directly affected by the secondary boycott under review here.

Tree Fruits files this brief as *amicus curiae* with the written consent of all parties to the case.

Tree Fruits Labor Relations Committee, Inc., hereinafter called Tree Fruits, is a Washington corporation with its principal office in Yakima, Washington. It is organized to advise with and act on behalf of its twenty-one employer-members which are business firms in the fruit-packing and warehousing industry in the vicinity of Yakima. It acts as the agent of its employer-members in labor disputes and in bargaining collectively with labor organizations represent-

ing employees of its employer-members (R. 17, 19, 23). Both Tree Fruits and its employer-members are employers within the meaning of section 2(2) of the National Labor Relations Act (R. 18).

## SUMMARY OF ARGUMENT

The decision of the Court of Appeals of the District is in conflict with the later decision of *Burr v. NLRB*, .... F.(2d) ....., 47 Labor Cases ¶ 18,376, decided July 18, 1963, by the Fifth Circuit, which we submit correctly reflects the intent of Congress.

The Court of Appeals of the District misconstrued section 8(b)(4) of the Act in such a way as to embarrass the enforcement of the entire paragraph, not only clause (B). By holding that the effect of picketing for a proscribed purpose must be proved before the Board can order the picketer to cease and desist from such conduct, the court has departed from the interpretation of section 8(b)(4) which has been settled since the section was first enacted in 1947. The Court of Appeals ignored the proviso to clause (B) of section 8(b)(4) and misconstrued the proviso which modifies all of paragraph (4). There is no basis in the language of the statute, its legislative history or the cases decided under the section as it stood prior to amendment, for holding that the *effect* of the picketing or other conduct is an element of an unfair labor practice under section 8(b)(4).

By attaching significance to the identity of the party filing the charge, the Court of Appeals has nullified to a large extent the provisions of section 10(b) and the Board's regulations providing that an unfair labor practice charge may be filed by *anyone*, not just by the real party in interest, or party directly injured. This error affects the enforcement of the entire Act.

The conclusion of the Court of Appeals that interpreting section 8(b)(4) as the legislative history indicates Congress intended and as the Board has interpreted it, creates difficulties under the First Amendment is unwarranted in the light of *Giboney v. Empire Ice & Storage Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834, and *Building Service Employees Union v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045, rehearing denied, 339 U.S. 991, 70 S.Ct. 1019, 94 L.Ed. 1391.

Congress clearly intended to ban all secondary picketing and especially picketing of secondary employers with appeals addressed to the consuming public not to buy merchandise produced or distributed by an employer with whom the union has a primary dispute.

Such legislation is well within the power of Congress to confine the scope of industrial disputes in the interest of keeping the channels of interstate commerce open and unimpaired. The Congressional intent should be given effect.

## ARGUMENT

### Preface

This case and its companion case, *N.L.R.B. v. Servette, Inc.*, No. 1053, bring before this court for the first time the 1959 amendments to the Labor-Management Relations Act of 1947 (Title 29 U.S.C. § 151, *et seq.*), relating to secondary boycotts, section 8(b)(4)(B) (Title 29 U.S.C. § 158(b)(4)(B)), and, in particular, those amendments as they relate to appeals by unions directed to the customers of secondary employers not to buy the products produced by a primary employer which the secondary employer is offering for sale, in other words, to what are commonly known as "consumer boycotts."

In the instant case the appeals were made by ambulatory pickets wearing cardboard placards which stated:

"TO THE CONSUMER: NON-UNION WASHINGTON STATE APPLES ARE BEING SOLD AT THIS STORE. PLEASE DO NOT PURCHASE SUCH APPLES. THANK YOU. TEAMSTERS LOCAL 760, YAKIMA, WASHINGTON."

The pickets also distributed handbills (R. 20).

Exhibit 9 is a photograph of two pickets patrolling in front of one of the secondary employer's stores and is reproduced in the record at page 33. Exhibits 7 and 8 are copies of the handbills which the pickets distributed (R. 31, 32).

In the instant case the United States Court of Appeals for the District of Columbia held that:

(1) ". . . § 8(b)(4)(ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation 'publicity other than picketing' even though it threatens, coerces or restrains an employer;" (R. 61) and

(2) any other interpretation of the statutory language would raise problems under the First Amendment of the Constitution of the United States (R. 62).

The First Amendment is set out in its entirety in Appendix B to this brief.

In the instant case there was no evidence as to the effect of the picketing.

In *Burr v. N.L.R.B.*, ——F.(2d) ——, 47 Labor Cases ¶ 18,376, decided July 18, 1963, the United States Court of Appeals for the Fifth Circuit declined to follow the court below and reached a diametrically opposite result on an indistinguishable set of facts. In that case the Board held, as it did in the instant case, that the picketing violated 8(b)(4)(ii), but not (i); the Fifth Circuit held that the picketing violated both 8(b)(4)(i) and (ii). The charging

party in the instant case did not seek review of the Board's decision with reference to (i) so the instant case presents the question of violation of (ii) only.

In the *Servette* case the appeals were made by the distribution of handbills without picketing, for the purpose of persuading customers not to buy and retailers not to sell merchandise not *produced*, but *distributed*, by the primary employer.

In *N.L.R.B. v. Servette*, the United States Court of Appeals for the Ninth Circuit held that the so-called "publicity proviso" to Section 8(b)(4) did not protect handbilling in furtherance of a dispute with a distributor as opposed to a producer, since the distributor did not produce any products. The same court reached the same result in *Great Western Broadcasting Corporation v. N.L.R.B.*, 310 F.2d 591.

Thus the two cases in which the court has granted *certiorari* present questions of first impression involving the same section of the statute, but the result in neither case will be dispositive of the other.

## I.

## The Court Below Misconstrued the Statute

### A. Legislative History

The Court of Appeals for the District candidly admitted that (then) Senator Kennedy and other legislators thought section 8(b)(4)(ii) would ban secondary consumer picketing, pp. 314-315, R. 60-61. Indeed, the legislative history hardly leaves room for argument on this point.

The message of the President of the United States, delivered January 28, 1959, Transmitting a 20 Point Program to Eliminate Abuses and Improper Practices in Labor-Management Relations, cited the need for federal legisla-

tion "to protect the public and innocent third parties from unfair and coercive practices, such as boycotting and blackmail picketing." The President said:

> "I recommend legislation—
>
> * * * To amend the secondary boycott provisions of the National Labor Relations Act so as to cover the direct coercion of employers to cease or agree to cease doing business with other persons; union pressures directed against secondary employers not otherwise subject to the act * * *." (1 Legis. Hist. p. 81-82)

Senate Report No. 187 on Senate Bill 1555, the Kennedy-Ervin bill relating to regulation of union funds, promoting union democracy, clarifying the "no man's land," and curbing activities of middlemen, but containing no amendments to the unfair labor practice section of the Taft-Hartley Act, included minority views which ultimately prevailed in the Congress. These minority views included the following:

> "The records of the National Labor Relations Board show that from the enactment of Taft-Hartley in 1947 until the present, 34 per cent of the secondary boycott cases coming to the Board involve the Teamsters Union which represents about 10 per cent of all of the members of organized labor. Thus, the figures demonstrate, that like minority picketing, the secondary boycott is a favorite device of the Teamsters, and is used by them at least three and one-half times as frequently as it is by any of the rest of the labor movement.
>
> "The basic justification for banning secondary boycotts is to protect genuinely neutral employers and their employees; not themselves involved in a labor dispute, against economic coercion designed to give a labor union victory in a dispute with some other employer. * * *
>
> "The major loopholes in the present ban on secondary boycotts are:

"(1) *Coercion of employers*—Present law makes it an unfair labor practice for a union or its agents to urge the employees of an employer to refuse to perform work for the purpose of compelling their employer to cease doing business with some other person. This provides the biggest loophole in present law. The prohibition is against the threatening or urging of the 'employees' of the other employer. Nothing is said about urging or persuading the employer of the secondary employees. Thus a union having a dispute with or attempting to organize the employees of employer A can go directly to employer B, who either uses employer A's products or supplies employer A with raw materials, and threaten employer B with a strike or picket line if he continues to do business with employer A. If the union happens to be the bargaining agent for the employees of B, it takes little persuasion of B to get him to stop doing business with A. B does not want trouble with the union with which he has a contract and anyway A is only one of his many suppliers or customers. So B readily succumbs to the union pressure and tells A he no longer wishes A's products or will no longer supply raw materials to A, and in so doing no one has violated present law. But look at the situation of employer A. Perhaps B is his primary customer or supplier. His alternative is to yield entirely to the union's demands, force his employees to join the union, or go out of business. Countless examples of actual cases corresponding to this hypothetical have been presented to congressional committees in various hearings since 1947.

"The bill, S. 748, meets this problem by amending section 8(b)(4) of the present law to make the restriction apply to 'threatern [sic], coerce, or restrain any person engaged in commerce * * *,' as well as 'induce or encourage any individual employed by any person.'" (1 Legis. Hist. 474-475)

Senator John L. McClellan, a proponent of the legislation, said:

> "* * * In other words, if there were a strike in a certain plant, and I, as a merchant, handled the products of that plant, under the amendment the union could not use picketing to try to compel me to cease handling the products of the plant where the labor dispute is under way.* * * " (II Legis. Hist. 1193(3))

Senator Wayne L. Morse, member of the Senate Committee on Labor and Public Welfare, an opponent of the legislation, said:

> "* * * This bill does not stop with threats and with illegalizing the hot cargo agreement. It also makes it illegal for a union to 'coerce, or restrain.' This prohibits consumer picketing. What is consumer picketing? A shoe manufacturer sells his product through a department store. The employees of the shoe manufacturer go on strike for higher wages. The employees, in addition to picketing the manufacturer, also picket at the premises of the department store with a sign saying 'Do not buy X shoes'. This is consumer picketing, an appeal to the public not to buy the product of a struck manufacturer.* * * " (II Legis. Hist. 1426(3))

Senator Barry M. Goldwater, member of the Senate Committee on Labor and Public Welfare, and a proponent of the legislation, said in two extensions of his remarks in the Congressional Record:

> "* * * But let me give you a variation that is not prohibited under the Taft-Hartley Act.
>
> "Take the same set of facts. The union has a dispute with Employer A. Employer A does business with Employer B. Instead of throwing a picket line around Employer B, the business agent of the union goes directly to Employer B himself in his office and says, 'Unless you stop doing business with Employer A, we will throw a picket line around your plant.' That's not il-

legal under present law, because there the inducement to cease doing business is made directly upon the secondary employer and not through his employees. Now that would be illegal under the new bill.

"Question: That was a loophole in the old law?

"Answer: Right." (II Legis. Hist. 1829(1))

"• • • This new amendment in the conference report also makes secondary consumer boycotts illegal subject to certain narrow and limited exceptions. Thus, under previous law a labor union having a dispute with the producer, company A, could lawfully picket the distributor, company B, who carried company A's products for sale, for the purpose of inducing consumers not to patronize company B, subject to certain restrictions imposed by the Board. Under the new amendment, such picketing becomes illegal, but the union is permitted to engage in publicity—by means other than picketing—truthfully advising the public that company B the distributor—the secondary employer—is distributing goods produced by Company A, the producer with whom such labor union has a primary dispute. • • • (II Legis. Hist. 1857(2))

Senator Paul Douglas, an opponent of the legislation, did not construe the effect of the language any differently, II Legis. Hist. 1833(1).

At no point in the debates was it even suggested that the *effect* of the picketing need be assessed before its *legality* could be determined.

On the contrary, opponents and proponents alike were of the opinion that the language of the amendment would require the Board to look to two factors only, objects and means. If (1) the object was to compel the secondary employer to cease doing business with the primary employer, and (2) the means used was picketing or other threats, coercion or restraint, save only publicity other than picketing,

under limited conditions, the conduct was unlawful, and the Board was not only to order the union to cease and desist from it, section 10 (c), but to ask the district court to enjoin it, section 10 (l). (Pertinent portions of section 10 are set forth in Appendix A of this brief.)

Thus Representative John A. LaFore, Jr., a member of the House Committee on Education and Labor, said:

> "* * * Another similar insidious variety is secondary consumer boycott. Under the present law a union can apparently picket the customer entrances of a retail store which is carrying a product manufactured by a company with which a union has a primary dispute. Similarly a union can organize a consumer or customer boycott against a distributing firm merely because that company advertises on a radio or television station or in a newspaper with which the union has a primary dispute. Sponsors of radio and TV programs and advertisers in newspapers are threatened with economic pressure and a loss of business by the union unless they discontinue their advertising. These are examples of secondary or consumer boycotts, a potent form of economic pressure that are intended to be made unlawful by the language of my bill." II Legis. Hist. 1471 (1) (2)

The legislative history is replete with references to the "loophole" in the 1947 Act which the Congress was determined to close.

The "loophole" was that the 1947 Act banned only inducement and encouragement directed to the employees of secondary employers. Congress intended to close the "loophole" by prohibiting inducement directed to *any individual employer by any person* engaged in commerce and by prohibiting threats, restraint or coercion of *any* person engaged in commerce, where an object is one of the four proscribed objects set out in subsections (A), (B), (C) and (D). Cox, the Landrum-Griffin Amendment to the National

Labor Relations Act, 44 Minn. L. Rev., 257. [It was stipulated that Safeway Stores, the secondary employer picketed, was engaged in commerce within the meaning of the Act (R. 18).]

Under the Act as it stood prior to the 1959 amendments, the actual effect of the picketing on the secondary employer was immaterial. *N.L.R.B. v. Business Machine and Office Appliance Mechanics*, 228 F.2d 558 (CA-2, 1955) cert. den., 351 U.S. 962, 76 S.Ct. 1025, 100 L.Ed. 1483 (1956); *N.L.R.B. v. Associated Musicians*, 226 F.2d 900 (CA-2, 1955) cert. den., 351 U.S. 962, 76 S.Ct. 1025, 100 L.Ed. 1483 (1956). "If the intended effect of the picketing be a prohibited one, the lack of success in coercing the neutral employees is immaterial." *N.L.R.B. v. Dallas General Drivers, Local No. 745*, 264 F.2d 642 at 648 (CA-5, 1959) cert. den. 361 U.S. 814, 80 S.Ct. 54, 4 L.Ed.2d 61 (1959).

Since Congress legislated extensively and elaborately on this subject in 1959 without inserting any new language to indicate that the Board or the courts should look to the *effect* of conduct instead of only to conduct and intent, it is a reasonable inference, and a principle of statutory interpretation, that Congress approved and adopted the contemporaneous construction expressed by the Board and the courts in the above-cited cases, Sutherland, Statutory Construction, 3rd Ed., § 5109; *N.L.R.B. v. Gullett Gin Co.*, 340 U.S. 361, 365-366, 68 S.Ct. 611, 92 L.Ed. 798.

The United States Court of Appeals for the Fifth Circuit has correctly appraised the legislative history in its opinion *in Burr v. N.L.R.B.*, ——— F.2d ———, 47 Labor Cases ¶ 18,376, p. 29, 482.

**B. The Language of the Section Does Not Support the Interpretation of the Court Below.**

**1. The use of the word, "threaten," negates the necessity of proving the effect of the picketing.**

After conceding that the legislative history strongly tends to support the Board's interpretation, the court below said:

> "Looking solely to the language of the statute, however, we believe the most plausible reading to be that § 8(b)(4)(ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation 'publicity other than picketing' even though it threatens, coerces or restrains an employer. For example, handbilling which has a severe economic impact on the secondary employer's business might be 'coercive,' but it would be exempted from regulation by the proviso. Perhaps the Board's view—that the proviso reflects the draftsman's assumption that without it all secondary publicity is banned because it necessarily threatens, coerces or restrains a secondary employer—can be squared with the statutory language. But that appears to be a less plausible reading of the statute." 308 F.2d 315, R. 61-62.

Such an interpretation would be more "plausible" if Congress had omitted the word "threaten," but to prohibit a threat does not mean that the threat is prohibited only if the threat is effective in obtaining the result sought by the threatener.

The threat is unlawful if it is made for an unlawful purpose, such as to force or require a person to cease selling the products of any other person or to force or require a person to cease doing business with another person.

Well-established precedents sustain the Board's view that two factors and two only need be considered in determining the legality of the conduct in question, namely, the conduct

itself, or the means employed, and the object. Thus a threat to picket for the proscribed objective would be unlawful, even though no picketing took place, and even though the threat was ineffective.

In *Brown v. American Federation of Television and Radio Artists*, 191 F.Supp. 676 (N.D. Cal. 1961), the court said:

> "In all events, even if respondents *were* entitled to publicize the facts by circulating such a leaflet, they were *not* entitled to threaten KXTV's advertisers, engaged in commerce, with such action, in order to force or require them to cease doing business with KXTV. It is *not* true that one may threaten to do whatever he may do. One may not threaten to take lawful action, where the purpose of the threat is illicit. Thus, a magazine editor may lawfully publish the truthful facts concerning unsavory incidents in the life of a person who is prominent in the public eye, such as a movie star or politician; but the magazine editor may not lawfully threaten to publish such facts unless the person concerned pays blackmail to the editor." (p. 679) (Emphasis by the Court)

Any other interpretation renders a prohibition against threatening a nullity. The Court of Appeals for the Fifth Circuit aptly pointed out:

> "The fallacy of the approach of the *Fruit & Vegetable* case is demonstrated by the fact that its standard effectually [effectively] deprives § (ii) of any real utility. The thesis of that decision is that the adverse economic effect of the consumer picket line must be demonstrated affirmatively as a fact. That means that to obtain the protection afforded by Congress against the *threat* of injury, a party must first be injured. And if it is actual injury, what is to be the test of injury? If, for example, under the union's threat of posting a consumer picket line, a secondary retailer knuckles under

as some did in *Servette, Inc.* (see note 10, *supra*), what must that retailer show? Must he prove not only that he lost the opportunity of making the average number of sales of that product, but also that this was not offset by substituted products of competitor suppliers? Must the retailer demonstrate by identified customers that some refused to (a) purchase the picketed product or (b) patronize him at all? These and many other questions which would inhere in every secondary consumer picketing demonstrate convincingly why Congress could not have intended that an Amendment designed to close a major and serious loophole would be stripped of all practical utility either by requiring that threatened damage be actually sustained, or that one feeling the pinch furnish specific answers to metaphysical inquiries as to the harm suffered." pp. 16-17 slip opinion, 47 Labor Cases ¶ 18, 376, pp. 29, 484.

The Notice to Store Manager and Store Employees, Exhibit 9 (R. 29-30) which the respondents gave to the managers of the Safeway Stores listed on Exhibit 4 (R. 26), said in part:

"Notice to Storage [*sic*] Manager and Store Employees.

"We are advised that you are presently engaged in selling Washington State Apples. . . .

"The strike at Yakima is still continuing and in order to win this strike, we must ask the consuming public not to purchase Washington State Apples.

"Therefore, we are going to place peaceful pickets at the entrances to your store for the purpose of trying to persuade the public not to buy Washington Apples. . . .

"As noted above, our information indicates that you are presently selling Washington State Apples. If, however, this information is not correct and you are selling apples exclusively from another state, please notify the undersigned and we will see that pickets are

transferred to another store where Washington State Apples are actually being sold."

No clearer notice could be given that the stores would be picketed until they stopped selling the offending product. This is precisely the sort of threat Congress sought to prohibit. The threat was complete when the notice was delivered and violated 8(b)(4)(ii)(B) even if no picketing had ensued. But picketing did ensue as indicated on Exhibit 4 (R. 26). Forty-six separate Safeway stores were in fact picketed for periods of time ranging from one to three days.

Had Congress intended that the *effect* of the conduct be appraised before its legality could be determined, it certainly would not have declared it an unfair labor practice to "threaten" as well as to restrain or coerce.

**2. The Court of Appeals Failed to Consider the Proviso to Clause (B).**

The Court of Appeals failed to take any cognizance at all of the proviso to clause (B) which reads:

> "Provided, that nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

So much attention has been focused on the last proviso to Section 8(b)(4), which specifically refers to consumers, that the proviso to clause (B), which specifically refers to picketing, has been largely passed over, but the proviso to clause (B) is dispositive of the question of whether or not peaceful picketing, without more, is comprised within the terms, "threaten, coerce or restrain," and disposes of that question in the affirmative. The proviso makes crystal clear that secondary strikes and secondary picketing, *secondary only*, fall within the ban of the statute.

The language of 8(b)(4)(ii)(B) without the proviso was originally embodied in S.B. 1384 introduced by Senator McClellan, I Legis History 327, 328. In the original Landrum-Griffin Bill, H.R. 8400, the same text appeared without the proviso, I Legis. Hist. 619, 681. The proviso was added by the House and Senate conferees. Mr. Griffin, as one of the House conferees, submitted a preliminary conference report including a table entitled, "Summary analysis of conference agreement as to Title VII—Taft-Hartley amendments." This table included the following:

| | House Bill (Landrum-Griffin) | Senate Bill (Kennedy-Ervin) | Agreement Conference |
|---|---|---|---|
| III. Other secondary boycotts | • • • | • • • | • • • |
| | 4. Prohibits secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute. | ——— do ——— | Adopt House provision with clarification that other forms of publicity are not prohibited; also clarification that picketing at primary site is not secondary boycott. II Legis. Hist. p. 1712. |

Mr. Frank Thompson, Jr., of New Jersey, a member of the conference committee, speaking in support of the conference report, said in part:

> "Employees will also be entitled to publicize, without picketing, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute." II Legis. Hist. p. 1720.

Similarly, Mr. Roland V. Libonati of Illinois, speaking against the conference report, said:

> "Unions can only advertise against an establishment selling unfair goods. Picket lines are illegal

where there is no primary dispute." II Legis. Hist. p. 1734.

Had "picketing" not been understood to be included in the terms "threaten, coerce or restrain," this proviso to clause (B) would have be meaningless. Picketing which is not peaceful is unlawful whether at a primary or secondary site. Picketing "not otherwise unlawful" is necessarily peaceful. The proviso draws peaceful *primary* picketing from the ban of the statute, leaving *secondary* picketing, however peaceful, banned.

**3. Effects are to be considered only for determining applicability of the proviso to subsection 8(b) (4).**

If there still remained any doubt about the meaning of 8(b)(4), that doubt should be laid to rest by the proviso which modifies all of paragraph (4), and which reads:

> "Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, *other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect* of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution." (Emphasis supplied)

This proviso reserves to the union or workers involved in the primary dispute, all forms of truthful publicity save one, picketing, for advising consumers, other members of organized labor and the public generally that a product or

products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have certain specified effects.

This proviso is the only place in paragraph (4) where Congress required proof of the effect of conduct before limiting the conduct. The only form of publicity denied any protection from the proviso is picketing.

The court below observed that when Congress wanted to outlaw picketing *per se*, it knew how to do so and cited 8(b)(7) as an example. Section 8(b)(7) is reproduced in Appendix A to this brief. Section 8(b)(7), however, *forbids nothing but picketing and threats to picket.*

Section 8(b)(4) is much broader, and prohibits in (i) inducement or encouragement, and in (ii), threats, coercion or restraint, for four proscribed objectives. That picketing was one of the forms of threat, coercion or restraint encompassed in the proscription is clear from the legislative history, the proviso to clause (B), and the proviso to paragraph (4). The proviso to (B) saved primary, but not secondary, picketing from the ban and the proviso to paragraph (4) saved publicity other than picketing for certain limited purposes, as long as specified effects were not engendered.

**4. The decision of the Court of Appeals affects the construction and enforcement of all of subsection 8 (b) (4).**

If the decision of the court below that the *effect* of the picketing must be determined before the picketing for the proscribed object falls within the ban of the statute were to be sustained, the decision would not merely render ineffectual the efforts of Congress to ban consumer picketing

as the Fifth Circuit observed, and all other secondary boycotts, but would embarrass the efficacy of all of 8(b)(4).

If it is necessary to show that the threats, coercion or restraint imposed on a secondary employer were effective to procure the proscribed objective, it must necessarily follow that the inducement or encouragement of employees referred to in (i) must also be effective in order to constitute an unfair labor practice.

The application to clauses (A), (C) and (D) of the court's holding that the effect of the picketing must be considered to find a violation of 8(b)(4) would be inevitable, if the decision were allowed to stand, and would lead to absurd results.

If peaceful picketing is not included within the words "threaten, coerce, or restrain," unless the picketing adversely affects the secondary employer's business, it must follow that 8(b)(4)(A) is not violated by picketing where an object thereof is forcing or requiring any employer or self-employed person to join any labor or employer organization, unless the self-employed person or employer actually joins the labor or employer organization or can prove economic injury from the picketing.

Likewise, picketing where an object thereof is (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees when another labor organization has been certified as the representative of such employees, would not be unlawful unless the employer yielded to the prohibited objective or suffered economic hardship as a result of the picketing.

Similarly, in the case of picketing (D) to force or require an employer to assign particular work to employees

in a particular labor organization, the Board would have to assess the effect of the picketing before it could order it stopped.

Thus the decision of the court of appeals affects not only the interpretation, application and administration of clause (B) of Section 8(b)(4)(ii), but all of 8(b)(4), because, what the court has held is, that conduct, unlawful intent and unlawful objective do not equal an unfair labor practice, but that the actual effect of the conduct must be assessed to determine whether or not the conduct constitutes a threat, coercion or restraint.

Section 8(b)(4) has never been so construed.

Such a reading of 8(b)(4) is inconsistent with the reading given by the Board and the courts, including the United States Court of Appeals for the District of Columbia, *Sheet Metal Workers v. NLRB* (CA-D.C., 1961) 293 F.2d 141; *NLRB v. United Construction Workers* (CA-4, 1952) 198 F.2d 391; *Printing Specialties & Paper Converters Union v. LeBaron* (CA-9, 1948) 171 F.2d 331; *NLRB v. Garment Workers Local 155* (CA-2, 1959) 267 F.2d 916. In the last-cited case the Court of Appeals for the Second Circuit said of 8(b)(4)(i) in part:

> "It has long been recognized that picketing in labor disputes often contains elements both of persuasion and of coercion. Insofar as picketing is free from coercive *intent or effect*, Congress has declared that it shall not be the basis for a finding of an unfair labor practice; and perhaps the declaration is necessary, if the Act is to avoid the First Amendment's imperative. 29 U.S.C.A. § 158 (c); see *International Brotherhood of Electrical Workers, Local 501, AFL v. N.L.R.B.*, 341 U.S. 694, 71 S.Ct. 954, 95 L.Ed. 1299. Nor is picketing unfair, under the Act, merely because it is shown to be coercive in effect; the tests set forth in the Act must be

> met. See *Garner v. Teamsters, etc.*, 346 U.S. 485, 74 S.Ct. 161, 98 L.Ed. 228. To render the union's activities illegal under § 8(b)(4)(C), two elements must concur: the labor organization must be inducing employees to strike or to engage in a concerted refusal to work; and an object of the union's activities must be its recognition by the employer as the representative of its employees, where another union has been certified by the Board." (267 F.2d 919) (Emphasis supplied)

In the above-cited cases evidence of the *effect* of picketing has been considered for the purpose of shedding light on the *intent* of the picketing, but the effect has never been considered an *element* of the unfair practice.

In the instant case the *intent* of the picketing is not in dispute.

**5. The Court of Appeals erroneously considered the identity of the charging party in assessing illegality.**

The court's observation that it is Tree Fruits, not Safeway, which is the charging party points to an academic and theoretical approach to the issue, rather than the practical approach sought by the Congress.

Section 10(b) of the Act does not require that the charge be filed by the real party in interest, but a charge may be filed by anyone. The Rules and Regulations of the Board, § 102.9, provides:

> "A charge that any person has engaged in or is engaging in any unfair labor practice affecting commerce may be made by any person."

Under this kind of statutory and regulatory language, no invidious inference should be drawn from the identity of the charging party.

The *Servette* case shows, if example were necessary, that retailers will withdraw an offending item from sale rather

than involve themselves in another's quarrel. If it requires the expenditure of time, counsel fees, attendance at hearings and so on, to say nothing of the unfavorable notices in union newspapers and periodicals, and possible embarrassment of its own labor relations by filing unfair labor practice charges against the labor organization involved in a dispute with one of its producers, only the staunchest crusader would undertake the venture rather than submit to the union's demands.

There is no warrant in the statutory language or the legislative history for assuming that Congress, in 8(b)(4)(B), sought to protect *only* secondary employers from economic harm. Congress did seek to protect this group, but it sought primarily to confine the scope of economic pressure and to keep the channels of interstate commerce open. Section 1 of the Act, fourth paragraph, provides:

> "Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed."

All of subsection 8(b) is designed to effectuate such intent. To argue that a primary employer is out of place protecting its retailers from unlawful picketing is as unrealistic as to argue that a particular employee has not suffered unlawful discrimination at the hands of his employer or his bargaining agent because he is not the charging party.

Congress has deliberately removed the onus of filing charges from the employers and employees it sought to

protect by providing that charges may be filed by *anyone*, not just by the party injured or the real party in interest.

The decision of the lower court goes a long way toward rendering futile this salutary provision. This aspect of the decision of the court below would, if allowed to stand, affect and hamper the enforcement of the whole Act.

## II.

## SECTION 8 (b) (4) AS CONSTRUED BY THE BOARD IS CONSTITUTIONAL

The court below began its discussion of the constitutional difficulties it thought were "by no means minimal" in the Board's interpretation, by quoting out of context and misapplying some remarks by Representative Griffin, p. 315, R. 62. The colloquies from which the court extracted its quotations are reprinted in full in Appendix C to this brief. That the excerpts quoted by the court are entirely inapposite is demonstrated by the exchange preceding the second excerpt:

> "Mr. Griffin—First of all I assume the gentleman is talking about primary picketing. We are not talking about a secondary boycott in this situation?
>
> "Mr. Gubser—That is right." II Legis. Hist. 1615.

The complete answer to the court's qualms about the constitutionality of 8(b)(4) as construed by the Board would seem to lie in the following language of this court in *Giboney v. Empire Storage Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834:

> "It is contended that the injunction against picketing adjacent to Empire's place of business is an unconstitutional abridgment of free speech because the pickeeters were attempting peacefully to publicize truthful facts about a labor dispute. See *Thornhill v. Alabama*, 310 U.S. 88, 102, and *Allen Bradley Co. v. Union*, 325 U.S. 797, 807, note 12. But the record here does not per-

mit this publicizing to be treated in isolation. For according to the pleadings, the evidence, the findings, and the argument of the appellants, the sole immediate object of the publicizing adjacent to the premises of Empire, as well as the other activities of the appellants and their allies, was to compel Empire to agree to stop selling ice to non-union peddlers. Thus all of appellants' activities — their powerful transportation combination, their patrolling, their formation of a picket line warning union men not to cross at peril of their union membership, their publicizing — constituted a single and integrated course of conduct, which was in violation of Missouri's valid law. In this situation, the injunction did no more than enjoin an offense against Missouri law, a felony.

"It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." pp. 497-498.

In *Building Service Employees' Union v. Gazzam*, 339 U.S. 532, 70 S.Ct. 784, 94 L.Ed. 1045, rehearing denied, 339 U.S. 991, 70 S.Ct. 1019, 94 L.Ed. 1391, the same principle was applied where the picketing enjoined was not for a felonious object, but for an object contrary to the public policy of the state. This court said:

"This Court has said that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution. *Cafeteria Employees Union v. Angelos*, 320 U.S. 293; *Bakery & Pastry Drivers & Helpers Local v. Wohl*, 315 U.S. 769; *American Federation of Labor v. Swing*, 312 U.S. 321; *Carlson v. California*, 310 U.S. 106; *Thornhill v. Alabama*, 310 U.S. 88; *Senn v. Tile Layers Union*, 301 U.S. 468. But since picketing is more than speech and establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey, this Court has not hesitated to uphold a state's restraint of acts

and conduct which are an abuse of the right to picket rather than a means of peaceful and truthful publicity. . . .

"Petitioners insist that the *Swing* case, *supra*, is controlling. We think not. In that case this Court struck down the State's restraint of picketing based solely on the absence of an employer-employee relationship. *An adequate basis for the instant decree is the unlawful objective of the picketing*, namely, coercion by the employer of the employees' selection of a bargaining representative. Peaceful picketing for any lawful purpose is not prohibited by the decree under review." pp. 536-537, 539. (Emphasis supplied)

Here the Board has found that the picketing had one of the four objectives proscribed by section 8(b)(4) of the Act (R. 46). It seems strange indeed to suggest, as the lower court, in effect, held, "that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct," which Congress has declared to be an unfair labor practice.

The United States Court of Appeals for the Fifth Circuit correctly rejected the argument that the Board's construction of the statute resulted in rendering the section invalid under the First Amendment in *Burr v. NLRB*, *supra*, 47 Labor Cases ¶ 18, 376, pp. 24, 484 - 24, 485.

The court below discussed picketing as a "signal" and seemed to think that the type of picketing here involved could not be prohibited by Congress because it did not purport to "signal" the employees of the secondary employer, citing Cox, Strikes, Picketing and the Constitution, 4 Vand. L. Rev. 574, 594.

Concerning the distinction between "signal" picketing and "publicity" picketing, Professor Cox himself said:

"This distinction between 'signal picketing' and

'publicity picketing' has been noted in discussions of the question whether picketing should be protected by the first and fourteenth amendments as a method of communication, but it attracted no significant judicial support." Footnote 41, Cox, the Landrum-Griffin Amendments to the National Labor Relations Act, 44 Minn. L. Rev. 257, 267.

In a case note in 62 Columbia Law Review 1336, reviewing the decision of the court below, the commentator said:

"In rejecting the construction of section 8(b)(4)(ii)(B) that would implement Congress' well-demonstrated intent to ban all secondary picketing, the court—reasoning that this interpretation was necessary to avoid deciding a 'serious' constitutional question — incorrectly synthesized past Supreme Court cases as not being applicable to all forms of picketing. The instant court placed great weight on a distinction between 'signal' and 'publicity' picketing urged some years ago by Professor Cox. Yet it is clear, as Cox himself has admitted, that the Court has never accepted, nor even considered, the tenability of such a distinction. Moreover, in at least one Supreme Court case upholding a ban on peaceful picketing, there was present neither an appeal to organized employees, *i.e.*, a 'signal,' nor effects sufficiently severe to justify a prohibition of 'pure speech.' While it may be possible to read the previous cases so narrowly as to set them, as a class, apart from the instant situation, this would fail to take into account the clear trend toward upholding all bans on peaceful picketing, short of the suppression of every effective means of relating to the public the facts of a labor dispute. Certainly section 8(b)(4)(ii)(B) of the amended act is not the omnibus prohibition against which the Supreme Court has inveighed, for throughout the act much room has been left for the communication of labor grievances. Its plainly articulated purpose, which has been expressly upheld by the Court as a legitimate ground for banning picketing, was to avert

secondary boycotts. In addition, the instant court's determination that the more plausible reading of the statutory language does not prohibit picketing *per se* is itself subject to attack. Reliance by the court on Congress' failure to ban picketing expressly in section 8(b)(4)(ii) when it had done so in the section of the act dealing with union recognition appears to be inapposite. In the latter section, distinctions were drawn between various forms of picketing, some of which were outlawed, where as in section 8(b)(4)(ii) all picketing was included within a single reference. The only issue raised by an examination of the actual words employed in section 8(b)(4)(ii) is whether 'picketing' is, without more, comprehended within the words 'threaten, coerce, or restrain.' Although uniformity does not prevail, both the common law and a widely held modern view is that labor picketing, by its very nature, does have coercive effects. In any event, the language of the section does not itself compel the narrow construction adopted by the instant court. The determinative factor, therefore, should have been the legislative intent that all secondary picketing be banned. The effect of the decision in the instant case is to make permissible a wide range of activity that Congress clearly sought to proscribe." pp. 1341-1342.

The lower court's citation of picket lines to voice objections to various policies of businesses, maintained by people other than labor unions, is wholly inapposite because section 8(b) does not relate to picketing generally or "do not patronize" appeals by such other groups. Section 8(b) provides that

> "it shall be an unfair labor practice for a labor organization or its agents . . ."

to engage in certain specified conduct. Consumer picketing is not forbidden to anyone else.

The power of the state and federal governments to limit

the scope of industrial conflict has always been recognized, Brandeis, dissenting, *Duplex Co. v. Deering*, 254 U.S. 443, 488, 41 S.Ct. 172, 65 L.Ed. 349; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834.

Moreover, the lower court was confused as to what "signals" Congress was prohibiting. The court overlooked the difference between clauses (i) and (ii). Clause (i) makes it an unfair labor practice to induce or encourage *any individual employed* by any person, etc., for the four proscribed purposes. Clause (ii) makes it an unfair labor practice to threaten, coerce or restrain *any person* for the four proscribed purposes. Thus the "signal" need not even be directed at employees to run afoul of clause (ii). Flashing the *picket* signal *at any person* for any of the four proscribed objectives is prohibited. The effect or intended effect on *employees* of a particular employer is irrelevant to a charge under clause (ii).

## CONCLUSION

The decision of the Court of Appeals for the District of Columbia is erroneous both in its construction of the statute and in its appraisal of the constitutionality of the Board's construction.

If allowed to stand, it will not only frustrate the intent of Congress in legislating with reference to consumer boycotts, but will overturn the settled construction by the Board and the courts of all of section 8(b)(4).

The decision of the Court of Appeals for the Fifth Circuit in *Burr v. NLRB*, — F.2d —, 47 Labor Cases ¶ 18,376, on the identical questions is a correct analysis and should commend itself to this court.

The decision of the court below should be reversed.

Respectfully submitted,

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## APPENDIX A

### PERTINENT PROVISIONS OF NATIONAL LABOR RELATIONS ACT

**61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 151, *et seq.***

**Section 2.** (2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shage holder or individual or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. (Title 29, U.S.C. § 152(2)).

**Section 8.** (b) It shall be an unfair labor practice for a labor organization or its agents—

* * *

(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or to

enter into any agreement which is prohibited by subsection (e) of this section;

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 159 of this title;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order of certification of the Board determining the bargaining representative for employees performing such work;

*Provided*, That nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recog-

nize under this subchapter: *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution. (Title 29, U.S.C. §158(b) (4))

• • •

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

(A) where the employer has lawfully recognized in accordance with this subchapter any other labor organization and a question concerning representation may not appropriately be raised under section 159(c) of this title.

(B) where within the preceding twelve months a valid election under section 159(c) of this title has been conducted, or (C) where such picketing has been conducted without a petition under section 159(c) of this title being filed within a reasonable period of time not to exceed thirty days from

the commencement of such picketing: *Provided,* That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 159(c) (1) of this title or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: *Provided, further,* That nothing in this subparagraph (C) shall be construed to prohibit any picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.

Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this subsection (Title 29, U.S.C. § 158(b) (7)).

**Section 10.** (b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such a person an order requiring such person to cease

and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: * * *

(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 158 (b) of this title, the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. * * * (Title 29, U.S.C. § 160(b), (c) and (1)).

## APPENDIX B

### FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## APPENDIX C

### (II Legis. Hist. 1615 (1-3))

Mr. Brown of Ohio —

Mr. Chairman, I should like to propound a question either to Mr. Griffin or to Mr. Landrum, the authors of one of the bills, relative to secondary boycotts. If I understood their testimony before the Committee on Rules correctly, the authors of this bill stated their bill will deal properly with secondary boycotts.

My question concerns the picketing of customer entrances to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentleman's bill?

Mr. Griffin —

Let us take for example the case that the President talked about in his recent radio address. A few newspapers reported that the secondary boycott described by the President would be prohibited under the present act. It will be recalled that the case involved a dispute with a company that manufactured furniture. Let us understand that we are not considering, as I understand your question, the right to picket at the manufacturing plant where the dispute exists.

Mr. Brown of Ohio —

That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.

Mr. Griffin —

Then, we are not talking about picketing at the place of the primary dispute. We are concerned about picketing at a store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so

that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law because of technical interpretations, the boycott would not be covered.

Mr. Brown of Ohio —

In other words, the Taft-Hartley Act does not cover such a situation now?

Mr. Griffin—The way it has been interpreted.

Mr. Brown—But the Griffin-Landrum bill would?

Mr. Griffin—Our bill would; that is right. If the purpose of the picketing is to coerce or to restrain the employer of that second establishment to get him not to do business with the manufacturer—then such a boycott could be stopped.

Mr. Brown of Ohio—Not to sell the goods of some concern that is on strike. Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

Mr. Griffin—Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacture, whether it is plumbing—

Mr. Brown of Ohio—Advertising.

Mr. Griffin—Advertising, or anything else, it would be covered by our bill. It is not covered now. * * *

Mr. Gubser—Mr. Chairman, I should like to ask the co-author of the Landrum-Griffin bill a question which follows along the lines of the questioning of the gentleman from Ohio (Mr. Brown). Specifically, under the Griffin-Landrum Bill, let us say there is a picket in front of a business establishment, and he carries a sign, "This establishment is not affiliated with the AFL." Could that be accomplished legally under the Griffin-Landrum bill?

Mr. Griffin—*First of all I assume the gentleman is talking about primary picketing. We are not talking about a secondary boycott in this situation?*

Mr. Gubser—That is right.

Mr. Griffin—We must look to the purpose of the picketing in the particular situation. Under H.R. 8400, looking at page 66, it provides that where an object of the picketing is to force or require employees to accept or select such labor organization as their bargaining agent, then the picketing in that case would be illegal unless the union can show that at least 3 out of 10 of the employees are interested in the union. This is subject, however, to the constitutional right of free speech. *Unless the picketing is for the coercive purpose intdicated it would not be affected by this language.* In other words, whether it is the handing out handbills or putting an ad in the paper or picketing, if it is done in such a way so as clearly to be nothing more than an exercise of free speech, then the provision would not be violated. (Emphasis supplied)

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# In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 88

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

### OPINIONS BELOW

The opinion of the court of appeals (R. 56–66) is reported at 308 F. 2d 311. The findings of fact, conclusions of law and order of the National Labor Relations Board (R. 34–44) are reported at 132 NLRB 1172.

### JURISDICTION

The judgment of the court of appeals was entered on June 7, 1962 (R. 67). The Board's petition for rehearing was denied on October 12, 1962 (R. 68). On January 9, 1963, the Chief Justice extended the time for filing a petition for certiorari to and including

March 11, 1963 (R. 69). The petition for a writ of certiorari was filed on March 11, 1963, and was granted on June 10, 1963 (R. 70; 374 U.S. 804). The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1) and Section 10(e) of the National Labor Relations Act, 29 U.S.C. 160(e).

## QUESTION PRESENTED

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended, makes it an unfair labor practice for a labor organization "to threaten, coerce, or restrain any person," where an object is to force him to cease doing business with another person. A proviso excepts "publicity, other than picketing * * * as long as such publicity does not have an effect" on deliveries.

The question presented is whether picketing at retail stores, urging customers of the stores not to purchase products which the stores have obtained from an employer with whom the union has a primary dispute, constitutes a "threat, coercion or restraint" within the meaning of this section, absent a showing that the picketing in fact inflicted any economic injury upon the stores or otherwise had a coercive effect.

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in the Appendix, *infra*, pp. 38–40.

## STATEMENT

### A. THE BOARD'S FINDINGS OF FACT

Tree Fruits is a corporation which represents 21 fresh fruit packing and warehousing firms in the Yakima, Washington area in collective bargaining with Local 760 (R. 35–36; 17–18, 23).[1] Three other firms in the area bargain separately with Local 760 (R. 36; 18). In 1960, the collective bargaining agreements between Local 760 and all these firms expired, and the parties attempted to negotiate new agreements (R. 36; 19). During negotiations, Tree Fruits proposed modifications in the agreement regarding such matters as union security, seniority, and overtime (R. 36; 19). These proposals were unacceptable to Local 760, and on August 29, 1960, Local 760 called a strike against employer-members of Tree Fruits and two of the independent firms (R. 36; 19).[2]

In December 1960, Local 760 decided, in furtherance of its dispute with the employers, to promote a "consumer boycott" of Washington State apples (R. 36–37; 1*a*). Local 760 requested Joint Council No.

[1] The two respondent labor organizations—Fruit & Vegetable Packers & Warehousemen, Local 760 and Joint Council No. 28 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America—are referred to collectively as the "Union," and individually as Local 760 and the Joint Council, respectively. The Board found that they were jointly responsible for the picketing hereafter described (R. 41).

[2] An agreement was reached with the third independent firm, Pacific Fruit and Produce Company, and no strike was called against it (R. 19).

28, with which it is affiliated, to assign or "loan" Joint Council organizers to Local 760 for the purpose of assisting with this program (R. 36; 19). The Joint Council executive board assigned Fred Bowen, a Joint Council organizer, to work with Local 760 until further notice (R. 36; 19, 24, 25). In late December, Local 760 instructed Bowen to carry out a program of picketing and handbilling at the premises of certain Safeway stores in Seattle, Washington, which were selling apples obtained from members of Tree Fruits (R. 36–37; 19–20).

Before the picketing began, the Union instructed the pickets to limit their activity to the consumer entrances to the stores; not to urge customers to refrain from patronizing the stores but merely to stop buying Washington State apples; and not to interfere with the work of employees in the stores or with pickups or deliveries to the stores (R. 37; 20, 27–28). Similarly, the Union gave each store manager a written document which recited Local 760's version of its dispute with Tree Fruits and explained that the purpose of the picketing was merely to make an appeal to consumers not to buy Washington State apples. The document added that, if any of the store employees stopped work or if deliveries were interfered with, the Union should be promptly notified and it would take steps to correct the situation (R. 37–38; 20, 29–30).[3]

[3] The same notice also advised the manager that if, contrary to the Union's information, the store was "selling apples exclusively from another state, please notify the undersigned

On December 27 and 29, 1960, and on nine days in January 1961, pickets appeared at 46 Safeway stores located in and near Seattle, Washington (R. 38; 20; 26).[4] The pickets carried placards which stated (R. 38; 20, 33):

> TO THE CONSUMERS: NON-UNION WASHINGTON STATE APPLES ARE BEING SOLD AT THIS STORE. PLEASE DO NOT PURCHASE SUCH APPLES. THANK YOU. TEAMSTERS LOCAL 760, YAKIMA, WASHINGTON

The pickets also distributed handbills which urged the public not to buy Washington State apples because the 1960 crop was being packed by non-union firms which were "unfair" to their employees (R. 38; 20–21, 31, 32).

The pickets arrived after the stores opened for business and left before the stores closed (R. 38; 21). They patrolled the sidewalks in front of the main customer entrances to the stores. At no time did the pickets walk in front of store entrances used solely by employees, or used exclusively for delivery of merchandise (R. 38; 21). At locations where stores were situated to the rear of a parking lot, the pickets confined their picketing to the public sidewalk near the entrance to the parking lot (R. 38; 21).

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and we will see that the pickets are transferred to another store where Washington States Apples are actually being sold" (R. 30).

[4] In most cases, two pickets appeared at each store, and at one store there were three. Generally the pickets remained for one or two days at a particular store although one store was picketed for a total of six days and another for four (R. 20, 26).

During the picketing, the employees of the stores continued to work in the normal way, and the stores continued to receive deliveries of merchandise as usual. No deliveries or pickups were stopped or interfered with, and no employee of Safeway or of any other employer quit work or refused to handle fruit packed by the employer-members of Tree Fruits (R. 39; 21). The picketing was peaceful at all times (R. 39; 21).

### B. THE BOARD'S CONCLUSIONS AND ORDER

Upon the foregoing facts, the Board concluded that the picketing at the Safeway stores was intended to threaten, restrain, or coerce Safeway for the purpose of forcing and requiring Safeway to cease selling or handling the products of the members of Tree Fruits. Accordingly, the Board held that, by engaging in such picketing, Local 760 and Joint Council No. 28 violated Section 8(b)(4)(ii)(B) of the Act (R. 41–47). The Board ordered respondents to cease and desist from the unfair labor practices, and to post appropriate notices (R. 42–43).[5]

[5] The Board dismissed the complaint insofar as it alleged that the Union's picketing also violated Section 8(b)(4)(i)(B) of the Act (R. 39–40). That section makes it an unfair labor practice for a union to "induce or encourage" employees of secondary employers to engage in a work stoppage or a refusal to perform services for the proscribed object (p. 38, *infra*).

The complaint did not contest the propriety of the Union's handbilling at the retail stores. The issue of whether such handbilling is within Section 8(b)(4)(ii)(B) and, if so, the extent to which it is privileged by the "publicity" proviso is presented in *National Labor Relations Board* v. *Servette, Inc.*, No. 111, this Term.

### C. THE DECISION OF THE COURT OF APPEALS

The court of appeals set aside the Board's order, and remanded the case to the Board for further proceedings. The court acknowledged that the legislative history as well as the words of the second proviso to Section 8(b)(4) supported the Board's view that the phrase "threaten, coerce, or restrain any person," as used in that section, was intended to outlaw all peaceful "consumer" picketing at the premises of a neutral employer when conducted in furtherance of the objectives proscribed by subparagraph (B) of that section (R. 61–62). The court concluded, however, that this interpretation "would raise serious constitutional questions," and therefore it interpreted those terms as barring consumer picketing only where it could be shown that in fact such picketing had had a coercive effect upon the neutral employer (R. 62–66). Since the Board had proceeded upon an erroneous legal premise that the statute completely bans consumer picketing at the premises of the secondary employer, the court remanded the case so as to permit the Board to take evidence on "whether Safeway was in fact threatened, coerced, or restrained" (R. 66).

### SUMMARY OF ARGUMENT

Section 8(b)(4)(ii)(B) of the National Labor Relations Act, as amended in 1959, makes it an unfair labor practice for a labor organization "to threaten, coerce, or restrain any person," where an object is to force or require him to cease doing business with another person. The plain meaning of the words "threaten, coerce, or restrain" is broad enough to en-

compass picketing at the premises of a neutral employer which appeals to his customers not to buy the products of an unfair employer which he handles—without regard to whether such picketing can be shown to have inflicted economic injury on the neutral employer or to have been otherwise coercive. For, as this Court recognized in *Hughes* v. *Superior Court*, 339 U.S. 460, 465, "the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication * * *." Thus, the mere presence of a consumer picket line at a neutral employer's premises imposes a threat of business loss which would tend to restrain and coerce that employer, and thereby exert pressure on him to cease business relations with the primary employer. The language of the second proviso to Section 8(b)(4) further indicates that subparagraph (ii) encompasses consumer picketing, irrespective of its actual impact on the neutral employer. That proviso excepts from the ban of Section 8(b)(4) "publicity, other than picketing," as long as such publicity does not "have an effect" on pick ups and deliveries at the neutral employer's premises.

The legislative history of both Section 8(b)(4)(ii) and the publicity proviso confirms the foregoing conclusion. It shows that Section 8(b)(4)(ii) was designed to close certain "loopholes" which existed under the old Section 8(b)(4)(A), and one of those specifically enumerated was the imposition of pressure on a neutral employer by means of picketing addressed to his customers. However, the language of the proposed amendment, i.e., "to threaten, coerce, or re-

strain," was broad enough to encompass not only picketing but also appeals to consumers by handbills and other forms of publicity. In the Conference Committee, a proviso was added to except "publicity, other than picketing," in certain circumstances. As Senator Kennedy explained: "We were not able to persuade the House conferees to permit picketing in front of that secondary shop, but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. 105 Cong. Rec. 17898–17899, II Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) 1432.

The words of Section 8(b)(4)(ii), the proviso, and the extensive and specific legislative history on this very point, in our judgment, establish that the statute, as drafted by the Congress and as intended, bans secondary consumer picketing without regard to its effect in the particular case. The question of the constitutionality of this ban is thus squarely presented and not to be avoided by interpretation.

The ban on consumer picketing imposed by Section 8(b)(4)(ii) does not contravene the free speech provisions of the First Amendment. It is settled that a State or Congress may, in enforcing a valid public policy, constitutionally enjoin peaceful picketing aimed at frustrating that policy. Thus, in *Electrical Workers, Local 501* v. *National Labor Relations Board*, 341 U.S. 694, it was held that Congress could validly ban peaceful picketing aimed at promoting a secondary boycott. Nor is that case distinguishable on the ground that there the picketing was directed at

unionized employees whereas here it is directed at members of the public. *Hughes* v. *Superior Court, supra,* shows that, even though the picketing seeks to attain its objective merely through an appeal to consumers not to patronize, it may be banned without offending the Constitution where the objective sought by the pickets is unlawful.

## ARGUMENT

### I

### THE UNION VIOLATED SECTION 8(b)(4)(ii)(B) OF THE ACT WHEN IT PICKETED SAFEWAY STORES TO PERSUADE THEIR CUSTOMERS NOT TO PURCHASE PRODUCTS OF THE PRIMARY EMPLOYER, TREE FRUITS

Section 8(b)(4) of the Act, as amended by the Labor-Management Reporting and Disclosure Act of 1959, provides that it shall be an unfair labor practice for a labor organization or its agents—

> (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where * * * an object thereof is:
>
> * * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * *.

The Union picketed 46 stores of Safeway (a person engaged in commerce or in an industry affecting commerce), with signs urging members of the consuming public not to purchase from Safeway apples which it

had obtained from Tree Fruits (with whom the Union had a primary dispute). The Board found (R. 41), and the court below did not disturb that finding, that the picketing had the secondary object forbidden by subparagraph (B)—"forcing or requiring" Safeway (any person) "to cease using, handling, * * * or otherwise dealing in the products" of Tree Fruits (any other producer, processor, or manufacturer). The only question is whether the Board properly held that such consumer picketing constituted action to "threaten, coerce, or restrain" Safeway, as those terms are used in subparagraph (ii). It is the Board's position that subparagraph (ii) prohibits picketing at the premises of a neutral employer which is addressed to his customers, whether or not there is a showing (which the court below would require) that such picketing has actually inflicted some economic injury upon the neutral employer or otherwise had a coercive effect. This position, we submit, is supported by the terms of the statute and its legislative history, and presents no constitutional problem.[6]

[6] The Board's position, although rejected by the court below, has been accepted by the Fifth Circuit in *Burr and Perfection Mattress & Spring Company* v. *National Labor Relations Board*, Nos. 18748, 19080, 19162, decided July 18, 1963, 53 LRRM 2800. The court in that case held that consumer picketing of the type here not only threatened, coerced or restrained the neutral employer in violation of Section 8(b)(4)(ii)(B), but it also constituted an inducement to neutral employees to stop work in violation of Section 8(b)(4)(i)(B). The Board believes that the latter holding of the court is erroneous (see p. 17, n. 12, *infra*).

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A. THE LANGUAGE OF SECTION 8(b)(4)(ii) CLEARLY ENCOMPASSES AND PROHIBITS SECONDARY CONSUMER PICKETING

The statute itself plainly establishes what is so clearly and unmistakably revealed by its legislative history—that Section 8(b)(4)(ii) encompasses and prohibits consumer picketing at the premises of a neutral employer (like Safeway), without regard to whether such picketing can be shown to have inflicted economic injury upon him in the particular case. The words "threaten, coerce, or restrain" reach any conduct which puts physical or economic pressure upon the secondary employer to bow to the union's will. There is no additional requirement that the threats, coercion or restraint be shown to have resulted in demonstrable economic injury or to have affected the conduct of the person against whom they are directed. Indeed, the mere act of threatening is barred, and by definition a threat is complete when made without regard to any consequences. Thus, a threat without more satisfies the literal terms of subparagraph (ii). If there were doubt, it would be removed by the settled construction of the words "coerce or restrain" in Sections 8(a)(1) and 8(b)(1), which had been held, long prior to 1959, not to require proof that the coercion or restraint actually affected employee activities. *National Labor Relations Board* v. *Ford*, 170 F. 2d 735, 738 (C.A. 6); *National Labor Relations Board* v. *Hill & Hill Truck Line, Inc.*, 266 F. 2d 883, 885 (C.A. 5); *Progressive Mine Workers* v. *National Labor Relations Board*, 187 F. 2d 298, 301

(C.A. 7); *National Labor Relations Board* v. *Reed*, 206 F. 2d 184, 189 (C.A. 9).

Consumer picketing imposes just such a threat and this Court has so recognized. *Hughes* v. *Superior Court*, 339 U.S. 460, 465; see, *infra*, pp. 32–34. The mere existence of a consumer picket line at a neutral employer's premises carries a threat of business loss which would exert pressure on him to cease business relations with the primary employer. Therefore, such picketing can reasonably be viewed as "threatening, restraining, or coercing" the neutral employer irrespective of whether it in fact caused him any economic loss. This conclusion, moreover, is consistent with the rule governing the application of Section 8(b)(4) in other instances, *i.e.*, that a violation of that provision does not ordinarily depend upon the success or failure of the union's efforts in applying pressure.[1]

The language of the second proviso to Section 8(b)(4) confirms that subparagraph (ii) encompasses consumer picketing, irrespective of its actual impact on the neutral employer. As noted, Section 8(b)(4)(ii) makes it an unfair labor practice to

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[1] See *Highway Truck Drivers and Helpers, Local 107* v. *National Labor Relations Board*, 273 F. 2d 815, 818 (C.A. D.C.); *National Labor Relations Board* v. *Associated Musicians, Local 802*, 226 F. 2d 900, 904–905 (C.A. 2), certiorari denied, 351 U.S. 962; *National Labor Relations Board* v. *United Steelworkers*, 250 F. 2d 184, 187 (C.A. 1); *National Labor Relations Board* v. *Laundry, Linen Supply & Dry Cleaning Drivers, Local 928*, 262 F. 2d 617, 620–621 (C.A. 9); *National Labor Relations Board* v. *Dallas General Drivers, Local 745*, 264 F. 2d 642, 648 (C.A. 5), certiorari denied, 361 U.S. 814.

"threaten, coerce or restrain any person" for the prohibited objective, and then there is a proviso which excepts—

> publicity, *other than picketing*, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute * * *. [Emphasis added.]

Here, as the court below in essence conceded, is the plainest indication that Congress knew that the words "threaten, coerce or restrain any person" would apply to picketing, outside a retail establishment, appealing to the public not to purchase a product sold therein. Furthermore, a subsequent qualification to the exception created by the proviso shows that Congress, when it intended to condition a proscription against secondary activity upon proof of its effect, said so explicitly; the qualification permits union publicity, other than picketing—

> as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.[8]

[8] See also the second proviso to Section 8(b)(7)(C), added by the 1959 amendments to the Act. That proviso excepts from the limitation on recognitional or organizational picketing imposed by Section 8(b)(7)(C), "picketing or other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any

The fact that Section 8(b)(4)(ii) does not use the word "picketing," whereas Section 8 (b)(7)* does, does not warrant the inference that consumer picketing *per se* is untouched by the former provision. Section 8(b)(7) regulates only one form of activity, *i.e.*, picketing for recognitional or organizational purposes. Section 8(b)(4)(ii), on the other hand, was intended to encompass other forms of exerting pressure on a neutral employer in addition to consumer picketing (see *infra*, pp. 17–21). It was therefore reasonable for Congress to use a broader phrase than "picketing" to define the scope of Section 8(b)(4)(ii). There is no doubt, for example, that the equally broad language of Section 8(b)(4)(i) (*infra*, p. 38) which prohibits the inducement of strikes or other work stoppages, encompasses peaceful picketing directed at employees even though "picketing" is not specifically enumerated. See *Electrical Workers, Local 501* v. *National Labor Relations Board* (*Langer*), 341 U.S. 694, 701–702.

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other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services."

* Section 8(b)(7), 29 U.S.C. 158(b)(7), provides in part:

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:

* * * * *

Interpretation of the words "threaten, coerce, or restrain" in Section 8(b)(4)(ii) to encompass secondary consumer picketing is not inconsistent with *National Labor Relations Board* v. *Drivers, Local 639 (Curtis Bros.)*, 362 U.S. 274. In that case, the Court held that peaceful picketing for recognition by a minority union was not barred by Section 8(b)(1)(A), which makes it unlawful for a union "to restrain or coerce * * * employees in the exercise of the rights guaranteed in section 7." Nowhere in its long opinion did the Court indicate that the words "restrain or coerce" were incapable of encompassing peaceful picketing. Rather, the Court held that the legislative history of Section 8(b)(1)(A) showed that Congress did not intend by that provision to inject the Board into the thorny area of peaceful picketing for recognitional or organizational purposes. Just the opposite case is presented here. As we now show, it is clear that Congress did intend that the terms "threaten, coerce, or restrain" used in Section 8(b)(4)(ii) would reach consumer picketing.

B. THE LEGISLATIVE HISTORY OF SECTION 8(b)(4)(ii) ESTABLISHES THAT CONGRESS GAVE SPECIFIC CONSIDERATION TO THE BANNING OF SECONDARY CONSUMER PICKETING AND DREW THIS SECTION TO ACCOMPLISH THAT RESULT

Any doubt as to the intention of Congress to prohibit picketing of a secondary employer that is addressed to his customers, without regard to its actual effect upon such employer, is dispelled by the legislative history of Section 8(b)(4)(ii) and the publicity proviso. Section 8(b)(4)(ii) was added to the Act in

1959 by the Landrum-Griffin amendments.[10] The old Section 8(b)(4)(A) barred only secondary boycotts that were achieved by inducing work stoppages by secondary employees. See *Local 1976, Carpenters' Union* v. *National Labor Relations Board*, 357 U.S. 93, 98. This left it open to unions to accomplish the same objective by such other means as threatening the secondary employer directly with a work stoppage,[11] or by engaging in consumer picketing at his place of business.[12] Congress regarded these decisions as loop-

[10] For a summary of the background of the amendments and their passage through Congress, see Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 1086; Cox, *The Landrum-Griffin Amendments to the National Labor Relations Act*, 44 Minn. L. Rev. 257; Ryan, *Secondary Boycotts Under the New Labor-Management Reporting and Disclosure Act of 1959*, 34 St. Johns L. Rev. 42; Note, 62 Col. L. Rev. 1336.

[11] See *Sealright Pacific, Ltd.*, 82 NLRB 271, 272, n. 4; *Rabouin* v. *National Labor Relations Board*, 195 F. 2d 906, 911–912 (C.A. 2).

[12] See *National Labor Relations Board* v. *Business Machine & Office Appliance Mechanics Conference Board*, 228 F. 2d 553, 559–561 (C.A. 2), certiorari denied, 351 U.S. 962; *National Labor Relations Board* v. *International Union of Brewery Workers*, 272 F. 2d 817, 819 (C.A. 10); *United Wholesale & Warehouse Employees, Local 261* v. *National Labor Relations Board*, 282 F. 2d 824 (C.A. D.C.). See also, *Upholsters Frame and Bedding Workers (Minneapolis House Furnishing Co.)*, 132 NLRB 40, 41–42 (1961); R. 39–40.

In conflict with these decisions, the Fifth Circuit has recently held that consumer picketing not only threatens, coerces or restrains the neutral employer in violation of the newly added Section 8(b)(4)(ii)(B), but such picketing also acts as an inducement to neutral employees to stop work and thus would also violate Section 8(b)(4)(i)(B), which, like the old Section 8(b)(4)(A), merely covers secondary boycotts brought about by

holes and sought to close them in Section 8(b)(4)(ii) by making it unlawful for a union "to threaten, coerce, or restrain any person" for the proscribed secondary object.

Such a provision first appeared in the Administration bill, which was introduced by Senator Goldwater.[12] Testifying in its behalf, Secretary of Labor Mitchell stated:

> If amended as proposed, the secondary boycott provision will apply to coercion of employers to cease doing business with another. The effect of this type of secondary activity is no less damaging upon employers and employees and no less contrary to the public interest than is

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inducing or encouraging workers to engage in a strike or a refusal in the course of employment to perform work. *Burr and Perfection Mattress & Spring Company* v. *National Labor Relations Board*, Nos. 18748, *et al.*, decided July 18, 1963 (Rives, J. dissenting on this point), 53 LRRM 2800, 2807-2808. We submit that the Fifth Circuit's view that consumer picketing not only appeals to members of the public, but also necessarily induces employees to engage in work stoppages, is based on the erroneous premise that picketing—irrespective of the legend on the signs, the place where it is conducted, or the steps taken by the union to limit the effect of the picketing—is *per se* a signal to employees to stop work. This premise has uniformly been rejected by other courts of appeals (see cases *supra*), and it is contrary to the understanding of Congress in enacting Section 8(b)(4)(ii). See also the proviso to Section 8(b)(7)(C) (n. 8, *supra*), which specifically recognizes a distinction between informational picketing and picketing which is designed to induce work stoppages by employees.

[12] See Sec. 503(a) of S. 748, I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959) 142.

the type of secondary activity presently prohibited by the act.[14]

However, the bill which was reported by the Senate Committee (the Kennedy-Ervin bill) made no changes in the old Section 8(b)(4)(A). This omission was criticized in a minority report issued by Senators Goldwater and Dirksen, which pointed out:[15]

> (1) *Coercion of employers.*—Present law makes it an unfair labor practice for a union or its agents to urge the employees of an employer to refuse to perform work for the purpose of compelling their employer to cease doing business with some other person. This provides the biggest loophole in present law. The prohibition is against the threatening or urging of the "employees" of the other employer. Nothing is said about urging or persuading the employer of the secondary employees. Thus a union having a dispute with or attempting to organize the employees of employer A can go directly to employer B, who either uses employer A's products or supplies employer A with raw materials, and threaten employer B with a strike or picket line if he continues to do business with employer A. * * * So, B readily succumbs to the union pressure and tells A he no longer wishes A's products or will no longer supply raw materials to A, and in so doing no one has violated present law. But

[14] Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, 86th Cong., 1st Sess., S. 505, *et al.*, p. 266.

[15] S. Rep. No. 187 on S. 1555, 86th Cong., 1st Sess. 79 (Minority Views), 1 Leg. Hist. 475.

> look at the situation of employer A. Perhaps B is his primary customer or supplier. His alternative is to yield entirely to the unions' demands * * * or go out of business. Countless examples of actual cases corresponding to this hypothetical have been presented to congressional committees in various hearings since 1947.

On the floor of the Senate, Senator McClellan proposed an amendment to Section 8(b)(4) which would, *inter alia*, have made it unlawful "to exert any economic or other coercion against * * * any person" for the proscribed objects.[16] He explained that it would close some of the loopholes in the existing law, including—

> pressure in the form of dissuading customers from dealing with secondary employers. That refers to establishipg a picket line around a merchant's store, when the merchant handles the product of a company or of a manufacturing plant in which there is a strike. In other words, that is a form of coercion against an innocent employer, in an effort to compel the employer who has a strike on his hands to come to terms with the union * * *.[17]

This amendment was rejected,[18] and the Kennedy-Ervin bill passed the Senate without changing the old Section 8(b)(4)(A).[19]

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[16] 105 Cong. Rec. 6666, II Leg. Hist. 1193.

[17] 105 Cong. Rec. 6667, II Leg. Hist. 1194.

[18] 105 Cong. Rec. 6671, II Leg. Hist. 1198.

[19] The Senate merely adopted a provision banning "hot cargo" agreements in the trucking industry. Sec. 707(a) of S. 1555 as passed by the Senate, I Leg. Hist. 582.

The Landrum-Griffin bill, which was introduced in the House, contained a provision similar to the Administration bill, making it unlawful "(ii) to threaten, coerce, or restrain any person" for the forbidden objects.[20] Congressman Griffin, one of the sponsors, explained that this clause was intended to cover the situation where, "instead of going to B's employees the union official goes directly to B and threatens him with labor trouble or other consequences, unless he stops dealing with company A."[21] Later, the following colloquy between Congressmen Griffin and Brown ensued:[22]

> Mr. BROWN of Ohio. * * *
>
> My question concerns the picketing of customer entrances to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentlemen's bill?
>
> Mr. GRIFFIN. Let us take for example the case that the President talked about in his recent radio address. A few newspapers reported that the secondary boycott described by the President would be prohibited under the present act.[23] It will be recalled that the case involved

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[20] Sec. 705(a) of H.R. 8400, I Leg. Hist. 681.

[21] 105 Cong. Rec. 15532, II Leg. Hist. 1568.

[22] 105 Cong. Rec. 15672-15673, II Leg. Hist. 1615.

[23] In a radio broadcast several evenings before, President Eisenhower had urged the enactment of legislation which would check, *inter alia*, the following activity (105 Cong. Rec. 19954, II Leg. Hist. 1842):

"Take another company—let us say a furniture manufacturer. The employees vote against joining a particular union. Instead of picketing the furniture plant itself, unscrupulous organizing officials * * * picket the stores which sell the fur-

a dispute with a company that manufactured furniture. Let us understand that we are not considering * * * the right to picket at the manufacturing plant where the dispute exists.

Mr. BROWN. * * * That is right. We are looking only at the problem of picketing at a retail store where the furniture is sold.

Mr. GRIFFIN. Then we are not talking about picketing at the place of the primary dispute. We are concerned about picketing at a store where the furniture is sold. Under the present law, if the picketing happens to be at the employee entrance so that clearly the purpose of the picketing is to induce the employees of the secondary employer not to handle the products of the primary employer, the boycott could be enjoined.

However, if the picketing happened to be around at the customer entrance, and if the purpose of the picketing were to coerce the employer not to handle those goods, then under the present law, because of technical interpretations, the boycott would not be covered.

Mr. BROWN * * * In other words, the Taft-Hartley Act does not cover such a situation now?

Mr. GRIFFIN. The way it has been interpreted.

Mr. BROWN * * * But the Griffin-Landrum bill would?

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niture this plant manufactures. The purpose is to prevent those stores from handling that furniture.

"* * * This kind of action is designed to make the stores bring pressure on the furniture plant and its employees—to force those employees into a union they do not want. This is an example of a secondary boycott.

"I want that sort of thing stopped * * *."

Mr. GRIFFIN. Our bill would; that is right. If the purpose of the picketing is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.

Mr. BROWN * * * Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

Mr. GRIFFIN. Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer not to do business with the manufacturer, whether it is plumbing——

Mr. BROWN * * * Advertising.

Mr. GRIFFIN. Advertising, or anything else, it would be covered by our bill. It is not covered now.

The Landrum-Griffin bill passed the House with the (ii) provision described above, and went to the Conference Committee along with the Kennedy-Ervin bill. Senator Kennedy and Congressman Thompson, in an analysis of the Landrum-Griffin bill, critized the (ii) provision on the ground that it would ban, not only consumer picketing at a secondary employer's premises, but other forms of consumer appeals as well.[24] The Landrum-Griffin provision was adopted

[24] The analysis noted (105 Cong. Rec. 16591, II Leg. Hist. 1708, emphasis added):

"The House bill provides that a union may not 'restrain' or 'coerce' an employer where an object is to require him to cease doing business with any other employer. The prohibi-

by the Conference Committee, but to avoid such a blanket ban on consumer appeals, which some members of Congress felt might present a constitutional problem, the publicity proviso—excepting certain forms of publicity "other than picketing"—was added. Explaining the proviso to the full Senate which was considering the report of the Conference Committee, Senator Kennedy stated (emphasis added):"

> Under the Landrum-Griffin bill it would have been impossible for a union to inform the customers of a secondary employer that that employer or store was selling goods which were made under racket conditions or sweatshop conditions, or in a plant where an economic strike was in progress. *We were not able to persuade the House conferees to permit picketing in front of that secondary shop,* but we were able to persuade them to agree that the union shall be free to conduct informational activity short of picketing. *In other words, the union* can hand out handbills at the shop, can place advertisements in newspapers, can make announce-

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tion reaches *not only picketing* but leaflets, radio broadcasts and newspaper advertisements, thereby interfering with freedom of speech.

"Suppose that the employees of the Coors Brewery were to strike for higher wages and the company attempted to run the brewery with strikebreakers. Under the present law, the union can ask the public not to buy Coors beer during the strike. It can picket the bars and restaurants which sell Coors beer with the signs asking the public not to buy the product. It can broadcast the request over the radio or in newspaper advertisements.

"The House bill outlaws such appeals to the general public for assistance in winning fair labor standards. * * *"

" 105 Cong. Rec. 17898–17899, II Leg. Hist. 1432.

ments over the radio, and *can carry on all publicity short of having ambulatory picketing in front of a secondary site.*"

Senator Goldwater, another member of the Conference Committee, added:"

> This new amendment in the conference report also makes secondary consumer boycotts illegal subject to certain narrow and limited exceptions. Thus, under previous law a labor union having a dispute with the producer, company A, could lawfully picket the distributor, company B, who carried company A's products for sale, for the purpose of inducing consumers not to patronize company B * * *. Under the new amendment, such picketing becomes illegal, but the union is permitted to engage in publicity—by means other than picketing—truthfully advising the public that company B

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" Note also the following colloquy between Senators Kennedy and Dirksen which occurred when, while the bills were in the Conference Committee, the Senate conferees reported to the Senate on the progress being made (105 Cong. Rec. 17328, II Leg. Hist. 1378):

"Mr. DIRKSEN * * * We got into a tizzy * * * about a mattress plant located, let us say, in Raleigh, N.C., which has a very good customer in St. Louis, Mo. They have a labor dispute in Raleigh, and the pickets show up at the customer's plant in St. Louis. We spend a day discussing what shall appear on the signs. Can they put something in the newspapers? Can they go on the radio? * * *

"Mr. KENNEDY * * * In that case, we have receded on the question of consumer picketing of a secondary employer.

"Now we are going quite far in limiting the right of unions, the traditional right to carry on picketing. And I will say to the Senator that on the point which he raises we have already agreed to the House position."

" 105 Cong. Rec. 19771, II Leg. Hist. 1857.

> the distributor—the secondary employer—is distributing goods produced by company A, the producer with whom such labor union has a primary dispute * * *."

And Congressman Thompson, another conferee, pointed out (emphasis added):

> 2. Consumer appeals: The right to publicize nonunion goods to consumers, without causing a secondary work stoppage is recognized in the conference agreement. Employees will also be entitled to publicize, *without picketing*, the fact that a wholesaler or retailer sells goods of a company involved in a labor dispute. All appeals for a consumer boycott would have been barred by the House bill."

The opponents of the bill took the same position. In fact, the ban of secondary consumer picketing was one of the reasons stated for their opposition. Thus, Senator Morse, a member of the Conference Committee, emphasized the precise prohibition at issue here

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[10] Senator Goldwater also stated (105 Cong. Rec. 17904, II Leg. Hist. 1437) that, with "some clarifying provisions," the conferees adopted the House bill on secondary boycotts, which also reflected the provisions of the Administration bill and the one introduced by Senator McClellan. He pointed out (*ibid.*):

"The Senate bill did not deal with the subject of secondary boycotts. The House bill, however, closed up every loophole in the boycott section of the law including the use of a secondary consumer picket line, an example of which the President gave on his nationwide TV program on August 6."

See also 105 Cong. Rec. 19849 (Senator Dirksen), II Leg. Hist. 1823.

[11] 105 Cong. Rec. 18133, II Leg. Hist. 1720.

as one of the reasons why he did not sign the Conference Report on the bill:[30]

CONSUMER PICKETING

> This bill * * * also makes it illegal for a union to "coerce, or restrain." This prohibits consumer picketing. What is consumer picketing? A shoe manufacturer sells his product through a department store. The employees of the shoe manufacturer go on strike for higher wages. The employees, in addition to picketing the manufacturer, also picket at the premises of the department store with a sign saying, "Do not buy X shoes." This is consumer picketing, an appeal to the public not to buy the product of a struck manufacturer. * * *

This history makes it clear that the President, proponents and opponents of the bills, and the members of the Conference Committee, which compromised the differences between the Senate and House bills, all gave specific consideration to the question whether to prohibit secondary consumer picketing, and in the end, with full understanding of the import of the action, the Congress determined to do so. The unanimity of expression of Congressional understanding of Section 8(b)(4)(ii) is overwhelming. Congress accepted the view, advanced by the President during the debate, that the mere existence of a consumer picket line imposed the threat of business loss which would tend to restrain and coerce the secondary

[30] 105 Cong. Rec. 17882, II Leg. Hist. 1426.

employer, and thereby exert pressure on him to cease doing business with the primary employer. Accordingly, by the words "threaten, coerce, or restrain," it determined to ban such picketing without requiring, or awaiting, a showing that it actually caused the secondary employer economic loss or otherwise coerced him.

As the Fifth Circuit pointed out in enforcing the Board's order against consumer picketing in *Burr and Perfection Mattress & Spring Company* v. *National Labor Relations Board*, No. 18748, *et al.*, decided July 18, 1963, the requirement imposed by the court below of showing that the picketing caused actual injury to the neutral employer (53 LRRM at 2806):

> deprives § (ii) of any real utility. The thesis of that decision is that the adverse economic effect of the consumer picket line must be demonstrated affirmatively as a fact. That means that to obtain the protection afforded by Congress against the *threat* of injury, a party must first be injured. And if it is actual injury, what is to be the test of injury? If, for example, under the union's threat of posting a consumer picket line, a secondary retailer knuckles under * * * what must that retailer show? Must he prove not only that he lost the opportunity of making the average number of sales of that product, but also that this was not offset by substituted products of competitor suppliers? Must the retailer demonstrate by identified customers that some refused to (a) purchase the picketed product or (b) patronize him at all? These and many other questions

> which would inhere in every secondary consumer picketing demonstrate convincingly why Congress could not have intended that an Amendment designed to close a major and serious loophole would be stripped of all practical utility either by requiring that threatened damage be actually sustained, or that one feeling the pinch furnish specific answers to metaphysical inquiries as to the harm suffered. [Footnote omitted.]

In sum, Congress has acted clearly and with stated intent to ban secondary consumer picketing. Its action, in our judgment, must be enforced in this case unless the Court holds that the Constitution protects such picketing as free speech. Congress did not intend, and the words of the statute do not impose, a requirement that the picketing be shown to have had an adverse effect on the secondary employer. The specific words of the proviso and the extensive legislative history leave no room for doubt or for an interpretation of the terms "threaten, coerce, or restrain" to reach a contrary conclusion. Thus, the constitutional question is squarely and simply presented.

## II

### SECTION 8(b)(4)(ii) AS APPLIED IN THIS CASE IS CONSTITUTIONAL

Initially, it should be noted that the conduct at issue under Section 8(b)(4)(ii) is limited to secondary consumer picketing. As the Fifth Circuit pointed out in *Perfection Mattress, supra* (53 LRRM 2806), "* * * the means of communicating the message to members of the public, including customers, actual or

potential, of any secondary employer are effectually open through the § 8(b)(4) proviso." As noted above (*supra*, pp. 5, 6, n. 5), the Union had engaged in handbilling at the premise of all the Safeway stores, but, consistent with the proviso, this was not made the subject of the Board's complaint. Thus, the constitutional question—which the court of appeals strove to avoid by its interpretation of the statute—is whether, where the union has at its command all other means of publicity to be used in aid of securing a boycott by the secondary employer, the banning of consumer picketing is prohibited by the First Amendment."[21]

It is settled law that "while picketing is a mode of communication it is inseparably something more and different." *Hughes* v. *Superior Court*, 339 U.S. 460, 464. It "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated." *Bakery Drivers* v. *Wohl*, 315 U.S. 769, 776 (concurring opinion). Picketing "establishes a *locus in quo* that has far more potential for inducing action or nonaction than the message the pickets convey." *Building Service Employees* v. *Gazzam*, 339 U.S. 532, 537.

Accordingly, it has been established, in a series of cases, that "a State, in enforcing some public policy

[21] The court of appeals, because of its interpretation of the words of the statute, did not reach this question. However, it indicated that in a proper case it would have to determine "whether the explicit exemption of other forms of communication from the reach of the statute saves its constitutionality." See R. 64–65, n. 11 and cases there cited.

• • • could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." *Teamsters* v. *Vogt*, 354 U.S. 284, 293.[12] And, in *Electrical Workers, Local 501* v. *National Labor Relations Board* (*Langer*), 341 U.S. 694, it was held that Congress had the same power. There it was contended that the ban against inducement or encouragement of work stoppages by secondary employees, contained in the old Section 8(b)(4)(A) (and continued in the current Section 8(b)(4)(i)(B)), could not constitutionally be interpreted as reaching such inducement or encouragement as flowed from the mere imposition of a picket line at the premises where the employees were at work. The Court rejected this contention, stating (341 U.S. at 705):

> • • • The prohibition of inducement or encouragement of secondary pressure by § 8(b)(4)(A) carries no unconstitutional abridgement of free speech • • •. The substantive evil condemned by Congress in § 8(b)(4) is the secondary boycott and we recently have recognized the constitutional right of states to proscribe picketing in furtherance of comparably unlawful objectives [citing *Gazzam, Hanke, Hughes,*

[12] See *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490 (picketing to compel a violation of the state antitrust law); *Building Service Employees Union* v. *Gazzam*, 339 U.S. 532 (picketing to compel the employer to force his employees to accept the union as their representative); *Teamsters* v. *Hanke*, 339 U.S. 470 (picketing to compel self-employed persons to join the union); *Hughes* v. *Superior Court*, 339 U.S. 460 (picketing to compel retail stores to hire a certain proportion of negroes); *Plumbers Union* v. *Graham*, 345 U.S. 192 (picketing to compel an "all union" job); *Teamsters* v. *Vogt*, *supra*, (picketing to compel the employer to force his employees to join the union).

*Giboney, supra*]. There is no reason why Congress may not do likewise.

The Union and the court below seek to distinguish *Electrical Workers* on the ground that the picketing there was addressed to employees who were union members, whereas here it was merely addressed to members of the public. It is argued that Congress could constitutionally regulate the former because it is a "signal" to action, *i.e.*, such picketing makes an appeal to individuals who "are subject to group discipline based on common interests and loyalties, habit, fear of social ostracism, or the application of severe economic sanctions" (R. 63); and when they see the picket line, they can be expected to respond to it. Picketing which appeals to the public, on the other hand, has no such "signal" effect and is "closer to the core notion of constitutionally protected free speech" (R. 63–64); to ban it, so the argument goes, runs afoul of the First Amendment, at least absent a specific showing that the picketing has imposed economic injury.

This distinction, however, was presented and rejected in *Hughes* v. *Superior Court*, 339 U.S. 460. In that case, a group of pickets peacefully patrolled the premises of a store owned by Lucky Stores, Inc., to compel the employer (Lucky) to hire Negro clerks on a proportional basis in relation to the number of Negro customers. The picket signs read: "Lucky Won't Hire Negro Clerks in Proportion to Negro Trade—Don't Patronize." The picketing was peaceful and orderly; the pickets did not prevent customers or employees of Lucky from going to and from the

store; and the picketing was unaccompanied by threats, misrepresentation, or intimidation. Nor was there a finding that the picketing in any way affected Lucky's business. The California Supreme Court nevertheless upheld an injunction against the picketing, on the ground that the objective of the picketing was contrary to declared state policy against discrimination in hiring (32 Cal. 2d 850, 198 P. 2d 885). It did so over the dissent of Justice Traynor, who contended that, since the picketing did not possess "signal" aspects, it could not constitutionally be enjoined (32 Cal. 2d 871, 198 P. 2d 897). This Court affirmed the California court, holding that the picketing was validly enjoined, for "The Constitution does not demand that the element of communication in picketing prevail over the mischief furthered by its use in these situations," i.e., to compel employment on the basis of racial grounds (339 U.S. 460, 464).

The Court—speaking about the kind of consumer picketing there involved and not merely about picketing which is a signal to employees—explained (339 U.S. 464–465):

> But while picketing is a mode of communication it is inseparably something more and different. Industrial picketing "is more than free speech, since it involves patrol of a particular locality and since the very presence of a picket line may induce action of one kind or another, quite irrespective of the nature of the ideas which are being disseminated" [quoting from *Wohl, supra*]. Publication in a newspaper, or by distribution of circulars, may convey the same

> information or make the same charge as do those patrolling a picket line. But the very purpose of a picket line is to exert influences, and it produces consequences, different from other modes of communication. The loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word. * * *

Accordingly, the Court concluded, "picketing, not being the equivalent of speech as a matter of fact, is not its inevitable legal equivalent. Picketing is not beyond the control of a State if the manner in which picketing is conducted *or the purpose which it seeks to effectuate gives ground for its disallowance*" (*id.* at 465–466, emphasis added).

In short, *Hughes* demonstrates that peaceful picketing in furtherance of an illegal objective may be constitutionally interdicted even though it is not a "signal" to *employee* action, but seeks to attain its objective merely through an appeal to consumers not to patronize.[33]

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[33] As one informed commentator has observed:

"What difference is there between the sympathetic cooperation of the public, on the one hand, and of workers, on the other? * * * All picketing is obviously conducted to coerce. The desired coercion is achieved through convincing customers not to enter, by persuading loyal employees to withdraw, by influencing job hunters to remain away, and by enlisting the aid of all other union folk with a prejudice against crossing picket lines. I do not suggest that peaceful picketing coerces those whose aid is requested. But I doubt if much support is won on intellectual conviction as to the merits of the cause. Most of it is probably induced by a combination of fear, prudence and social embarrassment—a sort of psychological coercion which compounds itself ultimately into economic coercion on the picketed business." Gregory, *Constitutional Lim-*

Nor is *Hughes* distinguishable on the ground advanced by the court below. Thus, the court acknowledged that, "even if picketing is in a given case 'pure speech,' this does not bar Congress from prohibiting such appeals," but it can do so only "if the gravity of the evil the legislature seeks to prevent, discounted by its improbability, justifies the infringement." In the view of the court of appeals, this test was met in *Hughes*, but a statutory ban on consumer picketing would not meet it, absent a showing of a "substantial economic impact" upon the secondary employer (R. 64).

Nothing in *Hughes* requires that, before the legislature may regulate the evil which the picketing seeks to further, it must be shown that the picketing has had a "substantial economic impact." There was no such showing in *Hughes;* all that was established was that the picketing attempted to bring about an objective which the legislature had a legitimate interest in proscribing. So here, in amending the Act in 1947 and again in 1959, Congress decided that the secondary boycott was a substantive evil which, if not checked, would unduly enlarge the area of labor disputes and disrupt the free flow of commerce. This judgment by Congress is enough, without more, to warrant a ban on picketing which seeks to achieve a secondary boycott. The validity of this analysis is confirmed by *Electrical Workers, supra.* While *Electrical Workers* involved picketing which was directed at employees, the Court's rationale clearly does not turn on that fact.

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*itations on the Regulation of Union and Employer Conduct*, 49 Mich. L. Rev. 191, 207 (1950).

Indeed, the Court cited *Hughes* in support of its holding (341 U.S. 705, n. 10), a case which, as we have shown, involved consumer picketing similar to that here."

As the Fifth Circuit stated in *Perfection Mattress, supra*, in concluding that Congress could constitutionally ban consumer picketing in furtherance of a secondary boycott (53 LRRM at 2806–2807):

> In our view of the evolutionary development of free speech and picketing, we do not share the view of the District of Columbia Court of Appeals which regards as the distinguishing element the presence or absence of a likelihood that the particular picketing will be a "signal" for action by the *employees* of the secondary employer. One thing is certain from the 1959 Amendments. Congress regarded the pressuring of a secondary *employer* as much an evil as efforts to induce or encourage his employees to strike or not to handle goods. The aim of the law is to free interstate commerce from the disruptive consequences of labor strife. In the legislative judgment, to "signal" *persons* into a sympathetic refusal to handle goods is no more obstructive than to bring about the same ultimate objective—cessation of business with the primary employer—through coercive pressures on the secondary employer. To tag one

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" The above analysis is not inconsistent with such cases as *Thornhill* v. *Alabama*, 310 U.S. 88, and *Chauffeurs, Local Union 795* v. *Newell*, 356 U.S. 341. Those cases involve legislative or injunctive bans drawn in "sweeping and inexact terms" (*Carlson* v. *California*, 310 U.S. 106, 112), which impose a blanket prohibition against all peaceful picketing irrespective of the legitimacy of the object.

> method as "consumer picketing" does not afford a constitutional insulation denied to the other. When the purpose of the conduct is the same, it is for Congress to determine that similar restraints may be imposed. [Footnotes omitted.]

In sum, the Board's conclusion that Section 8(b)(4)(ii)(B) of the Act bans peaceful consumer picketing in front of a secondary establishment, without regard to the demonstrated effect of such picketing, is consistent with the language of the statute and its legislative history, and presents no constitutional question. The Board's interpretation is thus entitled to stand.

## CONCLUSION

For the foregoing reasons, the judgment of the court below should be reversed and the case should be remanded with directions to enforce the Board's order.

Respectfully submitted.

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SEPTEMBER 1963.

## APPENDIX

The relevant provisions of the National Labor Relations Act, as amended in 1959 (61 Stat. 136, 73 Stat. 519, 29 U.S.C., Sec. 151, *et seq.*), are as follows:

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Sec. 8. (b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: * * * (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to

cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided,* That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; * * *

*Provided,* That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further,* That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution;

* * * * *

The relevant provisions of the National Labor Relations Act, as it existed prior to the 1959 Amend-

ments (61 Stat. 136, 29 U.S.C. Sec. 151, *et seq.*), are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services;

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1963

NO. 88

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

*v.*

FRUIT & VEGETABLE PACKERS &
WAREHOUSEMEN, LOCAL 760, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

## BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

### INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of national and international labor organizations having about thirteen million members. The right of American working people to advertise the existence of a labor dispute, and to seek the voluntary assistance of individual members of the consuming public, by the most effective means available, is of vital concern to the Federation and its affiliates. The AFL-CIO therefore wishes to submit to the Court its reasons for concluding that Congress has not prohibited, and constitution-

ally could not prohibit, peaceful picketing addressed solely to individual consumers, requesting them not to purchase the product of a nonunion firm at a retail outlet.[1]

Respondents will naturally concentrate on the applicability of the statute to the particular fact situation presented by this case. In our brief we will emphasize (1) the status of

[1] The AFL-CIO is equally interested in having sustained the position of the National Labor Relations Board in the companion case, *NLRB* v. *Servette*, No. 111, that (1) a request to a store manager not to continue doing business with a nonunion firm does not constitute an inducement of an "employed individual" to refuse "to perform any services," in violation of sec. 8(b)(4)(i)(B) of the National Labor Relations Act, and (2) a request to the consuming public at a retail outlet not to purchase products distributed by a nonunion wholesaler is protected by the proviso to sec. 8(b)(4), which expressly allows publicity that "a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer," even assuming *arguendo* there would otherwise be a violation.

The AFL-CIO has not attempted to intervene directly in *Servette*, because it believes most of the issues have been adequately covered by the NLRB brief and by the *amicus* brief filed by a union involved in a similar case. But we agree with the latter the Board has resorted too quickly to the 8(b)(4) proviso to save conduct which would not be "coercion" under 8(b)(4)(ii)(B) anyway.

We wish to emphasize, however, that apart from the statutory language and the legislative history, both of which confirm the NLRB's holdings in *Servette*, the gravest constitutional questions would be presented by any reading of the statute contrary to the Board decision in favor of the union. See, *e.g.*, Fairweather, "An Evaluation of the Changes in Taft-Hartley," 54 Nw.U.L. Rev. 711, 737 (1960) (a construction which would prevent a union from advertising its "dispute with a wholesaler or distributor" might be "highly questionable under the freedom of speech guarantees of the Constitution"); Fisher, "Constitutional Questions Under the New Act," 48 Geo. L.J. 209, 224 (1959) ("prohibitions on 'other publicity' do present substantial constitutional problems"). Everything said in this brief regarding the constitutional right to engage in pure consumer picketing will of course apply at least as strongly to nonpicketing appeals to individual employers, or their immediate managerial representatives, and to individual consumers, for their voluntary assistance in a labor dispute.

picketing by unions or by any other groups as a mode of free speech, entitled to constitutional protections against legislative restrictions or prohibitions, and (2) the legislative history of the 1959 amendments to the Taft-Hartley Act, which establishes that picketing directed solely against a product of a nonunion producer was wholly outside the area of conduct forbidden by Congress. We feel our presentation will enable the Court to appreciate more fully the wide-ranging implications of this case regarding the legality of picketing by many kinds of minority or protest groups, and will enable the Court to avoid any hurtful constitutional pronouncements by a plain, straight-forward reading of the statute, holding it inapplicable to the type of consumer picketing at issue here.

## ARGUMENT

### I. Peaceful Publicity Picketing Addressed Solely To Consumers, Requesting Them Individually And Voluntarily To Refrain From Purchasing A Nonunion Product At A Retail Outlet, Is Free Speech Protected By The Constitution.

If a constitutional question must be reached in this case, that question will be whether the two quiet and dignified union women whose picture appears as Exhibit No. 9 to the Stipulation of Facts in this case (R. 33) were exercising their constitutionally protected freedom of expression, rather than "coercing" someone, when they "walked back and forth on the sidewalks in front of the main customer entrances" at a supermarket, "wearing cardboard placards" which informed individual consumers a nonunion product was being sold at the store and requested them not to purchase that particular product (R. 38, 25).

Inseparably linked to this question is the question of whether the constitutional right of free speech applies to

peaceful picketing by Negroes protesting racial discrimination in public accommodations or employment,[2] by religious or patriotic groups protesting supposedly objectionable motion pictures, or by any other popular or unpopular groups attempting to present to the public in the most effective way possible their view of a controversial issue, and soliciting the voluntary assistance of the individual consumer through his withdrawal of patronage from the offending firm or product.

Recognition of one simple principle will cut away all the confusion which has grown up around the constitutional status of picketing; will place every decision by this Court on the subject since *Thornhill* v. *Alabama*, 310 U.S. 88, in a coherent and consistent pattern; and will provide an analytical guide whereby attention may be directed to the genuine constitutional issues involved whenever peaceful picketing is restricted or prohibited.

As a means of communication, picketing is free speech and is entitled to every constitutional protection afforded any other form of expression. The test in *Thornhill*, 310 U.S. at 104-05, that an abridgment of the right to publicize through peaceful picketing or similar activity "can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion," precisely parallels the general rule governing all forms of expression, laid down by Justice Holmes on behalf of this Court in *Schenck* v. *United States*,

[2] This of course is not a hypothetical situation. For example, in *NAACP* v. *Webb's City, Inc.*, No. 362, this Term, there is directly posed the issue of whether picketing by a Negro organization protesting the refusal by a Florida drug store to serve Negro customers in its cafeteria is protected by the First and Fourteenth Amendments' free speech guarantees. A Florida court found such picketing was not protected as an exercise of free speech.

249 U.S. 47, 52: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Cf. Dennis* v. *United States*, 341 U.S. 494, 510 (quoting with approval Judge Learned Hand's inquiry "whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger"). Properly understood, not a single holding of this Court regarding the status of picketing in a case subsequent to *Thornhill* departs one iota from the test enunciated in that decision.[3]

Put most simply, as has been stated by Professor Francis E. Jones, Jr., of Southern California Law School: "Picketing, like any other speech, is protected by the Constitution—as a *means;* however, like other speech, it will not be protected when used for the purpose of accomplishing

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[3] We naturally do not concede that every picketing case was rightly decided. In several instances the Court viewed the factual situation differently from the way we would have viewed it. But this does not affect our contention that, assuming *arguendo* the correctness of the Court's interpretation of the facts and of its evaluation of the object of the picketing, there has been undeviating decisional consistency on the status of picketing as such.

As a form of physical activity, picketing may also be subject to trespass laws, to reasonable regulations covering the use of public streets, and so on. See *Schneider* v. *Irvington*, 308 U.S. 147, 160; *Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722, 731 (Black, J., dissenting), and cases cited. The same would be true of any assemblage of persons to listen to a public speech, or to engage in a protest march or other popular demonstration. Furthermore, violent picketing, or picketing (like other utterance) "in a context of violence," has been held subject to prohibition. *Milk Wagon Drivers Local 753* v. *Meadowmoor Dairies*, 312 U.S. 287, 293. There is no suggestion that any of these elements were present in the peaceful and orderly picketing in the instant case (R. 38-39).

an unlawful *end*."[4] We suggest that the soundness of this analysis is readily verified by inquiring whether any case in which a ban on peaceful picketing was upheld would have been decided differently had the ban applied to an oral or written communication, at the same time and place, of the message conveyed by the pickets.[5]

The pivotal decision is *Giboney* v. *Empire Storage and Ice Co.*, 336 U.S. 490. There this Court, in a unanimous opinion, upheld a state court injunction against peaceful picketing aimed at inducing wholesale distributors to agree with a union not to sell ice to nonunion peddlers, in violation of a state statute forbidding combinations in restraint of trade. The validity of the state antitrust legislation being recognized, it was an easy step to conclude that "placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize

[4] F. E. Jones, "Free Speech: Pickets on the Grass, Alas!—Amidst Confusion, A Consistent Principle," 29 So. Calif. L. Rev. 137, 157 (1956). (Emphasis in the original.) See also E. A. Jones, "The Right to Picket—Twilight Zone of the Constitution," 102 Univ. Pa. L. Rev. 995, 1028 (1954).

[5] In certain situations picketing might constitute a "clear and present danger" that a "substantive evil" will be accomplished, while an oral or written communication delivered far from the scene or phrased in abstract terms might not. But that is a function of the time and place and specificity of the message conveyed by the picketing (including any special signification attached to it by prearrangement among some particular group), and not something inherent in the nature of the conduct itself. Any other kind of speech or advocacy likewise may or may not represent a clear and present danger which can be declared unlawful, depending on its tendency to generate concrete action. Compare *Dennis* v. *United States*, 341 U.S. 494, with *Yates* v. *United States*, 354 U.S. 298.

On the status of an unfair list used to "signal" a boycott by unionized employees acting in concert, see *Gompers* v. *Buck's Stove & Range Co.*, 221 U.S. 418, 439. *Cf.* Cox, "Strikes, Picketing and the Constitution," 4 Vand. L. Rev. 574, 601 (1951) ("the Court cannot long distinguish between the picket line and the unfair list").

that unlawful conduct from state control." *Id.* at 502. The gang leader's oral remarks to his henchmen may be speech in the truest sense, but if they are in furtherance of a conspiracy to rob a bank, they are not immune from the regulatory power of government. See, *e.g.*, *Fox* v. *Washington*, 236 U.S. 273, 277.

The critical factor is the end pursued, not the means used. If that end is unlawful, picketing, or any other form of expression in direct furtherance of it, can be restricted. If that end is lawful, and cannot constitutionally be declared unlawful, picketing, like any other form of expression in furtherance of it, cannot constitutionally be forbidden.[6]

In several of the cases where a ban on peaceful picketing has been upheld, the "unlawful end" or "substantive evil" proscribed by governmental authority was the "exertion of *concerted* pressure" by employees, typically acting subject to union sanctions or loyalties, to compel a person to do an act which a constitutionally permissible public policy had declared should be left to his free choice. See *Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722, 726. (Emphasis supplied.) In certain cases the act which the union wanted someone to do was itself unlawful, as in *Giboney;* in these instances even a direct, uncoercive inducement of the act could have been probibited. But where the act sought was lawful, the most this Court has ever held was that a person could constitutionally be insulated, in furtherance of a valid public policy, from the coercion brought to bear directly by a *combination* of employees, ordinarily acting pursuant to organizational rules and discipline. The Court has never held or suggested that it would be constitutional to prohibit anyone from advising individual mem-

[6] This assumes, naturally, that the picketing is peaceful and orderly.

bers of the consuming public that an employer (or his employees) had refused or failed to do some lawful act, and requesting those individual consumers voluntarily to refrain from patronizing that employer or his product.[7]

In addition to *Giboney*, where the wholesale ice distributors would have violated the Texas antitrust law by acceding to the union's demands, other cases in which picketing bans were upheld where, as the Court viewed the facts, even voluntary compliance with the union's desires would have been unlawful, include *Building Service Employees Local 262* v. *Gazzam*, 339 U.S. 532 (picketing to have employer force his employees to join a union, contrary to state statute forbidding such employer coercion); *Plumbers Local 10* v. *Graham*, 345 U.S. 192 (picketing to have employer require union membership as a condition of employment, in violation of state right-to-work law); *Teamsters Local 695* v. *Vogt*, 354 U.S. 284 (picketing to have employer force his employees to join a union). *Cf. Hughes* v. *Superior Court*, 339 U.S. 460 (picketing to have employer practice racial discrimination in hiring, contrary to state policy).[8]

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[7] See, *e.g.*, Smith, "The Labor-Management Reporting and Disclosure Act of 1959," 46 Va. L. Rev. 195, 242 (1960) ("[t]he line of Supreme Court decisions limiting *Thornhill v. Alabama* has not included any case going this far," *i.e.*, upholding a ban on "peaceful secondary picketing • • • directed toward • • • the withholding of customer patronage from the secondary employer when undertaken for a legally permissible object").

[8] Sound as it is as an abstract proposition, the "unlawful purpose" doctrine can create a serious threat to First Amendment rights in actual practice, as members of this Court and academic observers have been quick to point out. See, *e.g.*, Douglas, J., dissenting in *Teamsters Local 695* v. *Vogt*, 354 U.S. 284, 296 ("state court's characterization of the picketers' 'purpose' had been made well-nigh conclusive"); Cox, *supra* note 5, 4 Vand. L. Rev. at 598-99, n. 97 (1951) ("[w]hat does give cause for great concern is the Court's astuteness in finding for recent injunctions some basis in a

Cases where the person who was the target of the picketing could lawfully have done the act requested, but where valid state policy decreed his decision should not be coerced by the concerted pressures of organized employees, are represented by *Teamsters Local 309* v. *Hanke*, 339 U.S. 470 (picketing to enlist union deliverymen and union patrons to force self-employer to abide by union working conditions), and the "secondary boycott" cases, *Carpenters Local 213* v. *Ritter's Cafe*, 315 U.S. 722; *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675; and *IBEW Local 501* v. *NLRB*, 341 U.S. 694. In each of the last three cases a labor organization used picketing either as "a signal in the nature of an order to the members of the affiliated unions," 341 U.S. at 678, or as a "bare instigation," 341 U.S. at 701, 704, that organized employees leave their jobs or refuse to make deliveries, in order to force a supposed "neutral" to cease doing business with the primary employer.[9] We do not necessarily agree with the conclusions reached in all these decisions, but for the purposes of the instant case we need not quarrel with them. The crucial factor in every instance was that someone had a special interest of sufficient value (his status as an independent self-employer, or his status as a putative "neutral") that this Court felt the state could, consistent with the Constitution, protect him against being forced to relinquish it by a combination of employees responding to group discipline.

On the other hand, whenever this Court has dealt with peaceful picketing whose end was the doing of a lawful act by the target of the picketing, uncoerced by organized em-

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supposed state policy which will furnish a constitutional foundation"); F. E. Jones, *supra* note 4, 29 So. Calif. L. Rev. at 162.

[9] The rationales of "signal picketing" and "secondary boycott" were not expressly utilized in *Ritter's Cafe*, but they fit the facts as seen through the eyes of the Court.

ployees or a group acting in concert, the Court has consistently sustained the constitutional right of the picketers "to advise customers and prospective customers • • • and thereby to induce such customers not to patronize." *Thornhill* v. *Alabama*, 310 U.S. 88, 99; *AFL* v. *Swing*, 312 U.S. 321; *Bakery Drivers Local 802* v. *Wohl*, 315 U.S. 769; *Cafeteria Employees Local 302* v. *Angelos*, 320 U.S. 293; *Teamsters Local 795* v. *Newell*, 356 U.S. 341, *revg. per curiam* 181 Kan. 898, 317 P. 2d 815 (1957).

This distinction makes for a rational and practicable demarcation line. If picketing is used to instigate mass action by organized employees to make someone do a certain act, there may be occasions when society can constitutionally prohibit the mass action and the picketing or other "signal" used to set it in motion, see *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 678, even though the act sought is lawful in itself, and direct, uncoercive solicitation of it would be constitutionally protected free speech. But if the picketing is used simply to publicize the facts of a labor dispute and to request the voluntary support of individual consumers, acting wholly on their own without the pressure of group discipline, then such picketing is free speech as much as any other form of expression, and cannot constitutionally be forbidden, as long as the act which the picketing seeks to bring about is itself a lawful one.

Former Professor Archibald Cox has been a leading academic proponent of the view that "the constitutional decisions in picketing cases should depend, in part, on whether the 'publicity' or 'signal' aspect predominates."[10] He points out that in the "signal" situation, the picket's reliance "is on the sanctions inherent in the discipline and organized economic power of his union. Quite different is

[10] Cox, *supra* note 5, 4 Vand. L. Rev. at 595.

the peaceful picketing which is directed primarily to the general public. * * * the success or failure of pickets' appeal depends primarily upon the persuasiveness of their message."[11] Professor Cox concludes:

> "The critical inquiry is whether the employees' conduct involves an appeal to an uncoerced audience each individual in which is left free to choose his own course of conduct or invokes the power of an organized combination. * * * the worker and his union who are seeking an objective which is not itself inconsonant with the policy of the State, should be free to appeal to others for their voluntary, individual assistance."[12]

What has been said answers the Labor Board's arguments for the constitutionality of outlawing the type of picketing at issue in the present case. In essence those arguments are (1) consumer picketing, in addition to so-called "signal" picketing addressed to employees, may constitutionally be prohibited, as is shown by *Hughes* v. *Superior Court*, 339 U.S. 460 (NLRB Brief, pp. 32-34); and (2) Congress has decided that "the secondary boycott" is a "substantive evil," and this judgment "is enough, without more, to warrant a ban on picketing which seeks to achieve a secondary boycott" (NLRB Brief, p. 35). Such arguments are grounded on wholly misleading oversimplifications.

In *Hughes* this Court was faced with a state court injunction against picketing by Negroes at a retail store, about 50 per cent of whose customers were Negroes, demanding the employment of Negro clerks in proportion to the number of Negro patrons. The California Supreme Court had expressly declared: "The *controlling issue* is whether the sole objective involved—the discriminatory hir-

[11] *Id.* at 594.

[12] *Id.* at 602.

ing of a fixed proportion of Negro employees regardless of all other considerations—is lawful." 32 Cal. 2d 850, 852, 198 P. 2d 885 (1948). (Emphasis supplied.) After a careful consideration of state policy on the subject, the California court concluded that this type of discrimination would be the equivalent of the previously condemned "closed shop and a closed union," this time in favor of the Negro race, and so the picketing was for a "specific unlawful purpose." 32 Cal. 2d at 856. This Court affirmed California's judgment sustaining the injunction.

Justice Frankfurter, for the Court, expressly observed that picketing is subject to state control if "the purpose which it seeks to effectuate gives ground for its disallowance." 339 U.S. at 465-66. With that proposition he placed the case squarely within the rationale of *Giboney*, and, in light of the state court's declaration of policy against racial discrimination in hiring, nothing more had to be said. Indeed, Justices Black, Minton, and Reed concurred solely on the basis that *Giboney* controlled. (Justice Douglas did not participate.) The employer was being asked to do an act which was itself opposed to public policy, and any means constituting a clear and present danger of effectuating that evil, whether denominated publicity picketing or signal picketing or oral communication, would have been subject to state prohibition.[13]

Furthermore, unlike the pure publicity picketing upheld against state attack in *Thornhill*, *Swing*, *Wohl*, *Angelos*, and in the last significant picketing decision, *Newell*, the picketing in *Hughes* may, in a rather strained sense, be re-

[13] Justice Frankfurter seems to have thought that California may not have forbidden the employer "to adopt such a quota system of his own free will." 339 U.S. at 468. This is a dubious point, and certainly was not directly raised. At any rate racially proportionate hiring was plainly declared to be contrary to state policy, which is equivalent to saying it was unlawful, at least for certain purposes.

garded as having some of the "signal" aspects which apparently concerned Justice Frankfurter in a number of his opinions. The picketing in *Hughes* was carried on by Negroes, sought increased employment opportunities for Negroes, and was aimed at an audience composed of "about 50%" Negroes. In view of the possible social pressures and group loyalties present, it might almost be said the situation was not vastly different from one involving unionized employees on a job. But to suggest this as a conceivable distinction is to suggest how disquieting it is to find the Government, in the year 1963, apparently relying on a case like *Hughes* as its leading authority for the proposition that picketing as such, even in the context of a consumer appeal, is not the equivalent of speech (NLRB Brief, pp. 32-34). We can agree totally with the abstract proposition that picketing, like any other form of communication, can be interdicted when directed toward an unlawful end. That is how *Hughes* can and should be distinguished. Viewed solely as a means, however, picketing is simply the most effective mode of expression available to minority and protest groups, and we should have thought the Government would have been more solicitous to see that its usefulness remains unimpaired and that it is not relegated to the status of second-class speech.[14] *Cf.* Douglas, J., concurring in *Bakery Drivers Local 802* v. *Wohl*, 315 U.S. 769, 775, who queried whether "a State can prohibit picketing when it is effective but may not prohibit it when it is ineffective."

The picketing in the instant case was aimed at individual

[14] Surely Professor Cox was on firmer ground when he said regarding some of Justice Frankfurter's language in *Hughes*: "One wonders whether the opinion does not mistake for peculiar attributes of picketing characteristics which are common to all appeals for assistance in industrial controversies." Cox, *supra* note 5, 4 Vand. L. Rev. at 600.

members of the general public, composed, presumably, of the usual heterogeneous assortment who frequent an American supermarket. Their response to the pickets would depend on their personal predilections and the persuasiveness of the message presented. Group pressures or organizational sanctions would play no part in their decision. The key question, then, as counsel for the Labor Board seem to recognize, is whether the picketing was in furtherance of an "illegal objective" or a "substantive evil" which Congress has the constitutional power to prohibit (NLRB Brief, pp. 34-35).

For Labor Board counsel, the "substantive evil" is the "secondary boycott." As applied to the facts of this case, we do not know exactly what that means, and no further explication is provided. The union was seeking to persuade retail customers, individually and voluntarily, not to purchase the primary employer's product.[15] If this persuasion was successful, the retailer might drop the primary employer's product as a poor seller. To us this sounds more like "primary" than "secondary" activity. But however that may be, surely both the individual customer's decision not to buy, and the retailer's decision not to continue stocking an unpopular brand, are lawful acts beyond the constitutional power of Congress to prohibit. Since Congress cannot prohibit these ends, it cannot prohibit speech or peaceful publicity picketing used as the means to achieve them.[16]

[15] The NLRB does not question the simultaneous handbilling to accomplish the selfsame end (R. 38, 41).

[16] Even if the union had tried to persuade individual customers to stop patronizing the retailer altogether, in order to get him to stop handling the primary employer's product, the decisions of this Court would not justify forbidding the picketing. Each individual refusal to patronize would be a lawful act; the retailer's cessation of business with the primary employer would be a lawful act; and the retailer's decision, although it might be said to have been forced by the cumulative effect of individual, voluntary acts, was not co-

If the "substantive evil" should be described bluntly as the publicizing of a labor dispute anywhere except at the primary employer's premises, on the ground this might "unduly enlarge the area of labor disputes and disrupt the free flow of commerce" (see NLRB Brief, p. 35), that would merely serve to throw into bold relief the ramifications of the constitutional rights here at stake. Even commercial advertising and the reports of consumer research groups could be said to enlarge the area of intercompany disputes and to disrupt the free flow of commerce in competitive or poorly rated products. The position of the retailer selling such products would be essentially the same as that of the supermarket carrying Tree Fruits' apples. Yet the advertisers' and consumer groups' communications seem plainly protected. "Peaceful picketing," this Court has said, "is the workingman's means of communication." *Milk Wagon Drivers Local 753* v. *Meadowmoor Dairies*, 312 U.S. 287, 293. When that picketing is stripped of every element except a pure appeal to individual members of the general public to do a voluntary and lawful act, and forms no part of a scheme to cause anyone to do an unlawful act, it does not lose the character of free speech just because the message is communicated at the place where it is most likely to be effective.

A glance at the photograph of some of the picketing in this case (R. 33) will demonstrate better than any words why it is so essential that the workingman's message be communicated in this particular manner. Amidst the riot of advertising signs emblazoned across this typical store front, only placards carried to the scene can be expected to compete for the hurrying shopper's attention. If free speech

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erced by the concerted pressure of an organized group. See note 7, *supra*. But this question of course is not presented on the facts of the instant case.

is to mean efficacious speech, for every group in our society, such peaceful publicity picketing cannot constitutionally be prohibited.

**II. Congress Has Not Attempted To Prohibit Peaceful Publicity Picketing Addressed Solely To Consumers, Requesting Them Individually And Voluntarily To Refrain From Purchasing A Nonunion Product At A Retail Outlet.**

There is no need to reach a constitutional question in this case. Neither the statutory language nor the legislative history warrants the sweeping (but utterly crucial) conclusion of Labor Board counsel that the "*mere existence* of a consumer picket line at a neutral employer's premises carries a threat of business loss which would exert pressure on him to cease business relations with the primary employer," and therefore "can reasonably be viewed as 'threatening, restraining, or coercing' the neutral employe irrespective of whether it in fact caused him any economic loss" (NLRB Brief, p. 13; emphasis supplied).[17]

The statute itself says nothing about forbidding "consumer picketing," although Congress knew how to outlaw picketing, precisely and explicitly, when it so chose, as in section 8(b)(7) of the Act. Instead, section 8(b)(4)(ii)(B), at issue here, forbids a union to "threaten, coerce, or restrain" any person where an object is "forcing or requiring" him to "cease doing business with any other person." This general prohibition is subject to an express proviso allowing "publicity, other than picketing," to advise the public that one employer is distributing another employer's nonunion products.

A straight-forward reading of this provision was supplied by the unanimous Court of Appeals below, holding "that

[17] Counsel have not exaggerated the position of the NLRB itself, which is reflected by the flat statement that "consumer picketing in front of a secondary establishment is prohibited" (R. 41).

§ 8(b)(4)(ii) outlaws only such conduct (including picketing) as in fact threatens, coerces or restrains secondary employers, and that the proviso is intended to exempt from regulation 'publicity other than picketing' even though it threatens, coerces or restrains an employer" (R. 61). Such an interpretation pays proper heed to a familiar principle of statutory construction: "The office of a proviso is well understood. It is to except something from the operative effect, or to qualify or restrain the generality, of the substantive enactment to which it is attached." *Cox* v. *Hart*, 260 U.S. 427, 435. See also 2 Sutherland, *Statutory Construction*, § 4932, p. 469 (3d ed., 1943). Thus the critical inquiry is whether the consumer picketing in question falls within the general prohibition of the section as a threat, coercion, or restraint, not whether it falls within the excepting language of the proviso.

The Court of Appeals has thoroughly dealt with the particular circumstances of this case, emphasizing there was "no evidence concerning the impact of the picketing on Safeway's sales or its relations with the struck firms," noting that "Tree Fruits, not Safeway, is the charging party," and concluding that it had not been shown that the "picketing—directed against only one of hundreds of products sold by Safeway—caused or was likely to cause substantial economic injury" (R. 60, 63, 66). In short, evidence was lacking on the issue "whether Safeway was *in fact* threatened, coerced, or restrained" (R. 66; emphasis supplied). All this is true, and alone is enough to dispose of the present case, once there is demonstrated the error of the Board's contention that the statute makes unlawful *per se* all consumer picketing at a secondary employer's premises. But as *amicus* counsel we wish to go one step further and demonstrate, in addition, that the very *kind* of consumer picketing involved here, aimed at getting individ-

ual customers not to purchase a primary employer's product rather than not to patronize the secondary retailer, was beyond any prohibitory intent of Congress.

The words "restrain or coerce" constitute a " 'restricted phrase' to be equated with 'threat of reprisal or force or promise of benefit.' " *NLRB* v. *Teamsters Local 639*, 362 U.S. 274, 284, quoting from *IBEW Local 501* v. *NLRB*, 341 U.S. 694, 701-703. In *Teamsters Local 639* this Court pointed out that "[i]n the sensitive area of peaceful picketing Congress has dealt explicitly with isolated evils which experience has established flow from such picketing," and demanded the "clearest indication in the legislative history" that recognition picketing by a minority union was conduct to "restrain or coerce" employees in violation of section 8(b)(1)(A). 362 U.S. at 284. Finding only "isolated references" in the debates to suggest such a broad interpretation of the phrase, the Court rejected it. *Id.* at 286, 290. Since picketing by a minority union to get an employer to recognize the union as his employees' exclusive bargaining agent does not "coerce" the employees, picketing to persuade customers not to buy one particular product can hardly be said to "coerce" a retailer.[18]

Congress inserted part (ii) into section 8(b)(4) in 1959 in response to numerous assertions that there was a "loophole" in the existing law. While the Taft-Hartley Act forbade actual union inducements of secondary employees to

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[18] *Cf.* E. A. Jones, "Picketing and Coercion," 39 Va. L. Rev. 1063, 1065 (1953): "In the quoted passage from the *Senn* case Mr. Justice Brandeis takes in the causal sequence of peacefully conducted successful picketing—peaceful picketer to concurring viewer to affected concern. He recognizes that the societal pressure which has finished Senn as an entrepreneur is typical in our competitive society, that it is a result of publicity which persuades. There was no unlawful purpose involved; *there has been no coercion* • • •." (Emphasis supplied.) See also Dodd, "Picketing and Free Speech," 56 Harv. L. Rev. 513, 518, i. 11 (1943).

strike, the advocates of further restrictions complained it did not reach the "direct coercion" of secondary employers, or "threats" of secondary "strikes" or "labor troubles."[19] The phrase "threaten, coerce, or restrain" was intended to plug this loophole. But nowhere in the Senate Report or the House Report, or in the Conference Report's explanation of the publicity proviso which was added in conference to the House bill's general prohibition of coercion, is there the slightest indication that Congress intended to outlaw all consumer picketing at secondary premises. See S. Rep. No. 187, 86th Cong., 1st Sess. (1959); H. Rep. No. 741, 86th Cong., 1st Sess. (1959); H. Conf. Rep. No. 1147, 86th Cong., 1st Sess., p. 38 (1959).

That all such consumer picketing was not banned even by the original Landrum-Griffin bill, H.R. 8400, 86th Cong., 1st Sess., as passed by the House, is established by the very colloquy between Representatives Brown and Griffin which Labor Board counsel spread across three pages of their brief, in the evident belief that it furnishes a major prop for their argument (NLRB Brief, pp. 21-23). The key portions of this exchange are as follows:

"Mr. BROWN of Ohio. • • •

My question concerns the picketing of customer entrances

[19] See, *e.g.*, President's Message, S. Doc. No. 10, 86th Cong., 1st Sess., p. 3 (1959); S. Rep. No. 187, 86th Cong., 1st Sess., p. 79 (1959) (Minority Views); 105 Daily Cong. Rec. 1176 (Jan. 28, 1959), 2 Leg. Hist. 989 (Sen. Curtis); 105 Daily Cong. Rec. 1568 (Feb. 4, 1959), 2 Leg. Hist. 994 (Secretary of Labor Mitchell); 105 Daily Cong. Rec. 5764 (Apr. 21, 1959), 2 Leg. Hist. 1079 (Sen. Goldwater); 105 Daily Cong. Rec. 1304 (Jan. 29, 1959), 2 Leg. Hist. 1462 (Rep. Bosch); 105 Daily Cong. Rec. 13092 (July 27, 1959), 2 Leg. Hist. 1523 (Reps. Landrum and Griffin); 105 Daily Cong. Rec. 14195 (Aug. 11, 1959), 2 Leg. Hist. 1568 (Rep. Griffin); 105 Daily Cong. Rec. 14207-08 (Aug. 11, 1959), 2 Leg. Hist. 1580-81 (Rep. Rhodes); 105 Daily Cong. Rec. 14209 (Aug. 11, 1959, 2 Leg. Hist. 1582 (Rep. Dixon).

to retail stores selling goods manufactured by a concern under strike. Would that situation be prohibited under the gentleman's bill?

Mr. GRIFFIN [after discussing existing prohibitions]. However, if the picketing happened to be around at the customer entrance, *and if the purpose of the picketing were to coerce the employer* not to handle those goods, then under present law, because of technical interpretations, the boycott would not be covered.

Mr. BROWN of Ohio. In other words, the Taft-Hartley Act does not cover such a situation now?

Mr. GRIFFIN. The way it has been interpreted.

Mr. BROWN of Ohio. But the Griffin-Landrum bill would?

Mr. GRIFFIN. Our bill would; that is right. *If the purpose of the picketing is to coerce or restrain the employer of that second establishment,* to get him not to do business with the manufacturer—*then* such a boycott could be stopped.

Mr. BROWN of Ohio. • • • Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops, or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?

Mr. GRIFFIN. Of course, this bill and any other bill *is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce the retailer* not to do business with the manufacturer, whether it is plumbing—• • • [a]dvertising, or anything else, it would be covered by our bill." 105 Daily Cong. Rec. 14339 (Aug. 12, 1959), 2 Leg. Hist. 1615. (Emphasis supplied.)

In short, Representative Griffin, co-sponsor of the bill,

was three times offered the chance to say, unconditionally, that all secondary consumer picketing was outlawed by his proposal—and he three times turned that chance aside. Only "*if*" the picketing were aimed at "coercing" the secondary employer would it be proscribed.

Nothing more should have to be added to vindicate the union in the instant case and to confirm the soundness of the court's reasoning below. Representative Griffin's remarks represent the sole explicit commentary by a supporter of his bill on its applicability to secondary consumer picketing, prior to the bill's passage by the House. And the essence of his remarks is that such picketing is not *per se* unlawful; it is only unlawful when it is coercive in actuality, or at least when it has the purpose of being coercive in actuality. Such coercion might exist if the picketing were intended to cut off the secondary employer's deliveries, or his customers generally, especially if the picketing enlisted the support of organized employees. But in the absence of any shred of evidence supporting a finding of such actual or potential coercion, apart from the NLRB's *per se* doctrine that all consumer picketing at a secondary site is coercive, the Board's case in the present instance collapses.

It only remains for us to show that Congress never intended to outlaw peaceful publicity picketing asking customers not to buy nonunion goods, as distinguished from picketing asking customers not to patronize secondary establishments handling such goods. On this point the conference proceedings are the most enlightening.

The Senate conferees sought to whittle down the prohibitions of the Landrum-Griffin bill, even as applied to the "coercion" of secondary employers. To this end they proposed a proviso which would have excepted from regulation all "publicity for the purpose of truthfully advising the public." 105 Daily Cong. Rec. 15906 (Aug. 28, 1959), 2 Leg.

Hist. 1383. Ultimately, however, the Senators were forced to settle for the present proviso, which excepts only "publicity, other than picketing." The net effect was to retain the House bill's ban against "coercive" picketing, regardless of whether it is "publicity." But this still leaves untouched all picketing *not* coercive of a secondary employer.

Although the floor debates focused primarily on the way the proviso would cut back the House prohibition, they also indicated what was regarded as being coercive. Senator Kennedy reported, while the conference was in progress, that "[w]orkers would not be denied under the substitute the traditional right to ask the public *not to patronize one who sells* nonunion goods or goods of a manufacturer engaged in a labor dispute," but that the Senate conferees had "receded on the question of consumer picketing *of a secondary employer*." 105 Daily Cong. Rec. 15900-01 (Aug. 28, 1959), 2 Leg. Hist. 1377-78. (Emphasis supplied.) Senator Goldwater, finding "a general misunderstanding of many of these terms," defined a "secondary consumer, or customer, boycott" as "the refusal of consumers or customers *to buy the products or services of one employer* in order to force him to stop doing business with another employer." 105 Daily Cong. Rec. 16208 (Sept. 2, 1963), 2 Leg. Hist. 1386. (Emphasis supplied.)

Accordingly, when the conferees agreed to the proviso excepting "publicity, other than picketing" from the House bill's ban on coercion, it is fair to conclude they were only concerned with publicity and picketing "to ask the public *not to patronize one who sells* nonunion goods." It would be a remarkable twist if the *proviso* should somehow be construed as importing into the Act a substantive prohibition against picketing aimed only at primary products and not at secondary distributors, which is totally different from

the kind of secondary picketing over which the proviso battle raged.[20] This is especially true in light of Representative Griffin's insistence that his bill dealt only with picketing "to coerce the retailer," in the first place.

Against this background, an exchange between Senators Kennedy and Goldwater, during the Senate's consideration of the Conference Report, becomes readily understandable. In a passage where he was "[e]xplaining the *proviso*" (see NLRB Brief, p. 24; emphasis supplied), Senator Kennedy described one of the employee rights insisted upon by the Senate conferees: "(c) The right to appeal to consumers by methods other than picketing asking them to refrain from buying goods made by nonunion labor *and to refrain from trading with a retailer who sells such goods.*" 105 Daily Cong. Rec. 16414 (Sept. 3, 1959), 2 Leg. Hist. 1432. (Emphasis supplied.) It was only in this context that Senator Kennedy said the Senate conferees "were not able to persuade the House conferees to permit picketing in front of that secondary shop." *Ibid.* Any suggestion that all picketing to influence customers' decisions on purchasing certain products necessarily "coerces" the retailer was immediately dispelled by Senator Goldwater, who broke in to ask "whether there is anything in the conference report

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[20] Significantly, the proviso expressly permits nonpicketing publicity addressed to "the public, including consumers *and members of a labor organization.*" (Emphasis supplied.) This may suggest that it was the frequent use of picketing as a "signal" for concerted action, when directed to a union's members, which prompted the conference to distinguish between picketing and other forms of publicity. The statutory structure thus reinforces the view that picketing *not* addressed to the "members of a labor organization," but only to "consumers" and the public generally, was not within the scope of the prohibition. Indeed, from the face of the statute it could be concluded that no pure publicity picketing was forbidden, regardless of whether customers were asked not to purchase the primary product, or not to patronize the secondary retailer.

which would limit or prohibit the buy-America campaigns which are being carried on by certain unions and business groups." *Ibid.* Senator Kennedy replied: "I know that a good deal of effort has been made by some groups of workers, such as those who work on hats, *to make sure that their working standards are protected.* The answer to the Senator's question is no, it was not intended that the conference report have such an effect." *Ibid.* (Emphasis supplied.)

Senator Goldwater, also a Senate conferee and one of the most avid proponents of stiff boycott curbs, later provided an extensive analysis of the new Act. In discussing the amended section 8(b)(4), he pointed out that "under previous law a labor union having a dispute with the producer, company A, could lawfully picket the distributor, company B, who carried company A's products for sale, for the purpose of inducing consumers *not to patronize company B* • • •. Under the new amendment, *such* picketing becomes illegal." 105 Daily Cong. Rec. A8523 (Oct. 2, 1959), 2 Leg. Hist. 1857. (Emphasis supplied.) This treatment parallels the definition of a "secondary consumer boycott" which the Senator had previously supplied his colleagues.[21] And it confirms our view that the intent of the amendment's advocates was to deal with consumer picketing aimed at cutting off the business of secondary employers, not consumer picketing aimed at cutting off the sales of primary products.

In the House deliberations on the Conference Report, a similar distinction can be found between publicity picketing whose target is the "nonunion goods," and picketing whose target is the "wholesaler or retailer" selling such goods. Thus, Representative Thompson, a member of the Conference Committee, and Representatives Macdonald and Pucinski all cited the following analysis: "Consumer appeals:

[21] See p. 22, *supra.*

The right to publicize *nonunion goods* to consumers, without causing a secondary work stoppage, is recognized in the conference agreement. Employees will *also* be entitled to publicize, *without picketing, the fact that a wholesaler or retailer sells goods* of a company involved in a labor dispute." 105 Daily Cong. Rec. 16635 (Sept. 4, 1959), *id.* at A7855 (Sept. 8, 1959) *id.* at A8262 (Sept. 14, 1959), 2 Leg. Hist. 1720, 1810, 1820. (Emphasis supplied.)

Senator Goldwater submitted to the Senate, and Representative Griffin submitted to the House, the same "summary analysis" of the conference agreement. The Landrum-Griffin bill, this said, "[p]rohibits secondary customer picketing at retail store which happens to sell product produced by manufacturer with whom union has dispute." 105 Daily Cong. Rec. 16539 (Sept. 3, 1959) *id.* at 17181 (Sept. 9, 1959), 2 Leg. Hist. 1712, 1454. As previously indicated, what Senator Goldwater meant by "secondary customer picketing" was picketing to induce customers "not to patronize" the retailer handling unfair goods.[22]

The only explicit suggestions anywhere in the long legislative history that any of the bills introduced in the Senate or House, or the final conference agreement, may have encompassed consumer picketing aimed solely at nonunion products, consist of a few isolated remarks from opponents of the proposals, who are notoriously unreliable gauges of the legislative intent. Thus, Senator Humphrey said he "fear[ed]" such consumer picketing "may also be the target of the words 'coerce, or restrain.'" 105 Daily Cong. Rec. 5580 (Apr. 17, 1959), 2 Leg. Hist. 1037 (discussing Goldwater amendment rejected by Senate). Representative Thompson presented an analysis that under the Landrum-Griffin bill, a union picketing against a struck product

[22] See text at note 21, *supra*.

"*apparently* could be enjoined upon the ground that it was 'coercing' or 'restraining' the retailer." 105 Daily Cong. Rec. 15222 (Aug. 20, 1959), 2 Leg. Hist. 1708 (branding this "a basic infringement upon freedom of expression"). (Emphasis supplied.) And the only unequivocal declaration we have been able to find that the ultimate Conference Report applied to consumer picketing of an unfair product comes from Senator Morse, who was expounding his reasons for dissenting from the Report. See 105 Daily Cong. Rec. 16397 (Sept. 3, 1959), 2 Leg. Hist. 1426.[23]

All the while, however, the sponsors of the legislation were refusing to say any such thing. Not only did Representative Griffin decline a thrice-proffered invitation to declare that all consumer picketing at a secondary establishment was banned by his bill;[24] he warmly endorsed and inserted into the Congressional Record an address wherein Representative Kearns, subsequently another member of the Conference Committee, had stated flatly: "Not all picket lines and boycotts are coercive." 105 Daily Cong. Rec. A3933 (May 11, 1959), 2 Leg. Hist. 1746. And whenever Senator Goldwater, probably the Senate's leading exponent of restrictive labor legislation, was explicit about what kind of secondary activity he wanted proscribed, his formula was phrased in terms of a refusal to patronize the secondary retailer, not in terms of a refusal to purchase the primary product. In interpreting the statute, heaviest

[23] But even vigorous critics of the Landrum-Griffin bill can be found among those recognizing that its target was boycotts of secondary retailers, not boycotts of primary products. See, *e.g.*, 105 Daily Cong. Rec. 14517 (Aug. 13, 1959), 2 Leg. Hist. 1689 (Rep. O'Hara: "It would make unlawful appeals to consumers asking them *not to patronize the retail outlets* of producers operating with strikebreakers"). (Emphasis supplied.)

[24] See p. 20, *supra*. Awareness of the constitutional right of free speech was one of the specific reasons for Rep. Griffin's caution. *Ibid.*

weight should obviously be accorded the views of its sponsors and advocates, not the views of its opponents and detractors.

The pickets in the present case expressly disavowed any dispute with Safeway, the retailer (R. 31, 32). Safeway was not shown to have been injured in any way, and it lodged no complaints (R. 60, 63, 66). Customers were only asked to refrain from purchasing Tree Fruits' nonunion apples, not to stop patronizing Safeway (R. 38). The picketing took place at the most logical site; customers buy apples at retail stores, not at packing houses. Every item of evidence confirms this was picketing of a primary employer's product, not picketing of a secondary employer's business. Congress did not, and constitutionally could not, outlaw such peaceful publicity picketing.

## CONCLUSION

For the foregoing reasons and for the reasons set forth in the brief for respondents, the judgment of the court below should be affirmed.

Respectfully submitted,

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No. 88

In the

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OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD, *Petitioner*,

vs.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, *et al.*, *Respondents*.

## BRIEF FOR RESPONDENTS

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In the

# Supreme Court of the United States

OCTOBER TERM, 1963

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

vs.

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, *et al.*,
*Respondents.*

No. 88

## BRIEF FOR RESPONDENTS

### SUMMARY OF ARGUMENT

During the course of the 1960 negotiations between Respondent Local 760 and Tree Fruits Labor Relations Committee, which represented 21 Yakima Valley employers, an impasse developed and a strike was called. Within a week a majority of the struck employers were back in full production. In furtherance of the dispute the Respondents engaged in peaceful picketing and handbill distribution at the premises of Safeway Stores located in Seattle. The legend on the picket sign, the handbills, written instructions to the pickets and letters to the Safeway store managers made it abundantly clear that the Respondents were asking the public to refrain from purchasing Tree Fruit apples and that Respondents had no dispute with Safeway. Safeway experienced no interference with deliveries, there were no work stoppages or slowdowns and there was no inter-

ference with customer ingress or egress. The Board concluded that Respondents violated Section 8(b)(4)(ii)(B); however its order was denied enforcement in the court below.

The portion of the Act primarily relied upon by the Board interdicts threats, restraint and coercion by unions against employers. Since the record contains no evidence which would justify a finding of unfair labor practice, the Board asserts that the Respondents' conduct constituted *per se* a violation of the Act. The language of the Act and its settled construction are to the contrary.

When Congress enacted the 1959 amendments to the Act, it chose language ("threaten, restrain or coerce") which had been construed by this Court as having a "restricted" connotation *(Int'l B'hood of Electrical Workers v. Labor Board,* 341 U.S. 694, 701-703), language which did not *per se* encompass peaceful picketing. *Drivers Local 639 v. Labor Board,* 362 U.S. 274, 284. Had Congress intended to proscribe picketing as such it would have used the term "picket" in Section 8(b)(4)(ii) as it did in the proviso to that Section and in Section 8(b)(7) of the Act.

Properly construed, Section 8(b)(4)(ii) reaches picketing conducted at the premises of a retail store if there is evidence in the record that the picketing is designed to be coercive of the retailer. In the absence of such evidence—and in this case there is none—the picketing does not violate the law. The proviso relating to handbills merely exempts coercive, non-picketing programs absent proof that the program was intended

to cause work stoppages. In other words, in picketing cases a violation exists where there is proof of (1) unlawful means and (2) unlawful object. In non-picketing cases a violation exists where there is proof of (1) unlawful means, (2) unlawful object and (3) intended effect. The Board in this case has not proved either unlawful means or object.

The legislative history of the Act neither supports nor requires the Court to adopt the Board's *per se*, irrebuttable presumption approach to Section 8(b)(4)(ii). Fairly read the legislative history of the Act evidences a concern over the use of consumer boycotts designed to impose an embargo upon a retailer doing business with a struck firm (2 Leg. Hist. 1383 (3), 1386 (1), 1377(2)). There is no evidence of an intention to prohibit programs designed to persuade the public to refrain from purchasing a particular product which, as the Board itself acknowledges, is not in the classical sense a secondary boycott. Accordingly, it is submitted that neither the language of the Act nor its legislative history support the Board.

Moreover, there is a total absence of record evidence to support the Board's conclusion that the Respondents sought to achieve an unlawful objective. And as true with respect to its findings of unlawful means (i.e. restraint and coercion) the Board substituted presumption for evidence. The Board's finding of object was premised on the theory that consumers might not buy as many Tree Fruits apples as they did formerly and then Safeway might not buy Tree Fruits apples, and when Safeway did that it would have ceased doing business with Tree Fruits employers. Since the Union

must have foreseen this, says the Board, the Respondents' objective was to cause Safeway to cease doing business with Tree Fruits employers. It is respectfully submitted that compound possibilities should not be allowed to stand in the stead of evidence. When possible "effects" are equated with "objective," the distinction between lawful primary and unlawful secondary conduct becomes hopelessly confused. *Douds v. Int'l Longshoremen's Ass'n*, 224 F.2d 455, 459 (C.A. 2). It is possible that Safeway would have continued to purchase the same number of Tree Fruits apples as it formerly had purchased; it is possible that Safeway would have purchased fewer Tree Fruits apples, and it is possible that Safeway would have ceased purchasing such apples. But there is not one iota of evidence in the record to justify the Board's finding that it was the Respondents' objective to force or require Safeway to cease doing business with Tree Fruits employers.

Moreover, the Board's view of the Act unnecessarily creates substantial constitutional problems. The picketing in this case was totally devoid of any "signal" or speech-plus content. On the record before this Court, it cannot be said that Respondents were engaged in anything more than an exercise of free speech. A substantial First Amendment right is involved in this case. This fact alone is sufficient reason to reject the Board's construction of the Act which necessarily questions the existence of that right. *Knights Templars' & M. Life Indem. Co. v. Jarman*, 187 U.S. 197, 205.

If the Board's reading of the Act is adopted by this Court—and it should not be—the Act is patently unconstitutional as construed and applied to the facts of

this case. Pure communication, nothing more, is revealed by the stipulations and exhibits which make up the record in this case. Therefore, it is incumbent upon the Court to test the Respondents' claim of right by the standards enunciated in non-picketing cases such as *Staub v. Baxley*, 355 U.S. 313, 322-325 and *Talley v. California*, 362 U.S. 60, 63, 65. The Act as construed and applied by the Board cannot survive the experience.

## I. THE UNION'S PEACEFUL PICKETING AT THE PREMISES OF THE SAFEWAY STORES WAS CONDUCTED FOR THE SOLE PURPOSE OF PERSUADING MEMBERS OF THE PUBLIC TO REFRAIN FROM PURCHASING TREE FRUITS APPLES (*I.E.* A PRIMARY PRODUCT BOYCOTT) AND WAS WHOLLY DEVOID OF ANY "SIGNAL" CONTENT; ACCORDINGLY SUCH PICKETING DID NOT VIOLATE SECTION 8(b)(4)(ii)(B) OF THE ACT

On August 29, 1960 the Union[1] commenced a strike against the 21 employers represented by Tree Fruits. Within a week most of the struck employers—notwithstanding the strike—were back in full operation (Appendix A., *infra*, pg. 34). In December, 1960 the Union, in furtherance of its dispute, decided to ask "the public not to buy" (R. 19) apples packed "by non-union strike breaking workers. . . ." (R. 31). This was done by peaceful picketing at Safeway Stores and by the distribution of handbills (R. 19-21). Care was taken to

[1] Respondent Fruit & Vegetable Packers and Warehousemen, Local 760, and Respondent Joint Council 28 are both affiliates of the International Brotherhood of Teamsters, Warehousemen and Helpers of America and are referred to in this brief as the "Union." Tree Fruits Labor Relations Committee, Inc., the charging party, is referred to as "Tree Fruits." Petitioner National Labor Relations Board is referred to as the "Board." The National Labor Relations Act, as amended, 61 Stat. 136, 73 Stat. 519, 29 USC Sec. 151 *et seq.* is referred to as the "Act."

avoid any involvement of Safeway employees or interference with customer ingress or egress (R. 19-21, 27-30). Similarly, care was taken to specifically advise the public that the Union was not engaged in a strike against Safeway (R. 27-28, 31-32). On January 9, 1961, Tree Fruits—not Safeway—filed the unfair labor practice charges which gave rise to this case (R. 2).

The record in this case is devoid of evidence tending to show that the Union's program had the slightest impact on Safeway. As the court below noted, "there was no work stoppage, no interruption of deliveries, no violence or threat of violence. The record does not show whether pickets 'confronted' consumers or whether consumers felt 'coerced' by their presence. Nor does the record show that the picketing — directed against only one of hundreds of products sold by Safeway — caused or was likely to cause substantial economic injury" (R. 65-66).

Given a record devoid of evidence tending to support a finding that the Union's picketing was coercive, it is understandable that Board attempts to support its finding of unfair labor practice by asserting that consumer picketing is *per se* coercive and therefore unlawful (R. 41, 59-60; Board Br. pg. 13). As will be demonstrated below, the Board's contentions are not supported by the Act and unnecessarily raise substantial constitutional problems.[2]

[2] As used in this brief the term "consumer picketing" is used as a shorthand reference to describe the Union's activities as revealed by the record in this case; namely a request to consumers to refrain from purchasing Tree Fruit apples. The request was communnicated by handbills and picket signs; however, consumers were specifically advised that the Union had no dispute with Safeway.

### A. Section 8(b)(4)(ii) of the Act Does Not Purport to Equate Consumer Picketing with "Coercion" as that Term Is Used in the Act.

Section 8(b)(4)(ii)(B) provides that it is unlawful for a labor organization "to threaten, coerce, or restrain . . . any person . . . where . . . an object thereof is . . . forcing or requiring any person to cease doing business with any other person. . . ." The third proviso to Section 8(b)(4) declares "that for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public . . . that . . . products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer. . . ."

In construing this language "We look first to the face of the statute" (*Jarecki v. G. G. Searle & Co.*, 367 U.S. 303, 307) for the "[m]ost relevant [legislative material], of course, is the very language in which Congress has expressed its policy and from which the Court must extract the meaning most appropriate." *Carpenters Local 1976 v. Labor Board*, 357 U.S. 93, 100 (1958).

#### 1. The term "restrain or coerce" is a restricted phrase and does not *per se* encompass peaceful picketing.

When it enacted Section 8(b)(4)(ii), Congress selected language ("threaten, coerce or restrain") which had been given a definitive antecedent construction in *Int'l B'hood of Electrical Workers v. Labor Board*, 341 U.S. 694, 701-703 (1951). Discussing its ruling in the *Electrical Workers* case, this Court in *Labor Board v. Drivers Local 639*, 362 U.S. 274, 284, observed:

"In *International Brotherhood of E.W. v. NLRB*, 341 U.S. 694, the Court, in holding that a peaceful strike to promote self-organization was proscribed by Section 8(b)(4)(A) if its objective was to 'induce or encourage' a secondary boycott contrasted the language of the two subsections and labeled the words 'restrain or coerce' in Section 8(b)(1)(A) a 'restricted phrase' to be equated with 'threat or reprisal or force or promise of benefit.' 341 U.S. at 701-703."

The *Drivers Local 639* case overturned the Board's so-called Curtis Brothers[3] doctrine. Under that doctrine picketing having a recognitional purpose was treated as a restraint or coercion of the right of non-employees to retain their unorganized status. This Court, affirming the Court of Appeals for the District of Columbia, rejected the Board's contention. In doing so, this Court noted that "Section 13 of the Act is a command of Congress to the courts to resolve doubts and ambiguities in favor of an interpretation . . . which safeguards the right to strike as understood prior to the passage of the Taft-Hartley Act." 362 U.S. at 282. Although the *Drivers Local 639* case arose under Section 8(b)(1) of the Act, the Court's reading of that Section in *pari materia* with Section 13 is plainly applicable to this case. See *e.g. Seafarers International Union v. Labor Board*, 265 F.2d 585, 591 (C.A.D.C.).[4]

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[3] *Curtis Bros. Inc.*, 114 NLRB 116.

[4] As the Board noted in *Labor Board v. Servette, Inc.*, No. 111, Oct. Term 1963, Br. pg. 12, note:

"In the classical sense, this [a product boycott] is not even a secondary but only a primary boycott. See *Teller, Labor Disputes and Collective Bargaining* (1940), Vol. I, Sec. 145; *Duplex Printing Co. v. Deering*, 254 U.S. 443, 446."

In short, both before and after the enactment of the 1959 amendments to the Act, this Court accorded a "restricted" meaning to the term "restrain or coerce"; a meaning which barred the Board from treating peaceful picketing as the legal equivalent of "restrain or coerce." The Congress was not unaware of this *(Labor Board v. Gullett Gin Co.,* 340 U.S. 361, 366), as is evidenced by the fact that Congress used the term "picketing" as a term of art in Section 8(b)(7) and in the proviso to Section 8(b)(4).

**2. Properly read, Section 8(b)(4) prohibits consumer picketing only if there is evidence *aliunde* that the picketing was coercive.**

The Board argues, as it must, that consumer picketing *per se* is coercive of the retailer; but, as *Drivers Local 639* teaches, the term "restrain or coerce" is a restricted phrase and does not *per se* encompass picketing.

The proviso to Section 8(b)(4) merely excepts from the term "threaten, restrain or coerce" non-picketing programs, even though coercive, absent proof of intended effect.[3] The office of a proviso is to limit, not expand, that which precedes it. *Wayman v. Southard,* 10 Wheat. 1, 30. Stated differently, it is respectfully submitted that the "consumer boycott" proviso should be read as imposing an excepting rule of construction

[3] Section 8(b)(4)(ii)(B) makes it unlawful:
"... to threaten, coerce, or restrain ... any person ... where ... an object thereof is ... forcing or requiring any person to cease doing business with any person ..."
The proviso states:
"... nothing contained in [Sec. 8(b)(4)] shall be construed to prohibit publicity, other than picketing ... so long as such publicity do[es] not have an effect" of causing a work stoppage.

which accords preferred treatment to non-picketing publicity. Under the view here urged, non-picketing publicity would come within 8(b)(4) only upon proof of: (1) proscribed inducement or coercion, and (2) proscribed objective, and (3) intended effect as defined in the proviso. Such rule is to be contrasted with that applicable in picketing cases in which proof of the third element, intended effect, is not required. The point does not require further elaboration, since the Board does not attempt to defend in this Court the view expressed in its opinion (R. 41) that the "proviso" independently prohibits consumer picketing.

In essence, this case represents but another attempt by the Board to substitute a *per se* rule for record evidence. *Compare: Teamsters Local 357 v. Labor Board*, 365 U.S. 667, 676. The Board until recently was of the view that picketing at secondary premises was *per se* a prohibited "inducement" of secondary employees. A contrary consensus of judicial opinion developed[*] and the Board ultimately abandoned its *per se* inducement rule. Explaining its present view the Board in this case stated (R. 39-40):

> "The General Counsel contends that the conduct of Respondents violated Section 8(b)(4)(i) and (ii)(B) of the Act under the Board's decision in the *Perfection Mattress* case.
>
> "1. In that case a majority of the Board held that a picket line at the premises of a secondary

[*] *Wholesale Employees Local 261 v. NLRB*, 282 F.2d 824, 826-827 (CA DC); *NLRB v. Brewery Workers Local 366*, 272 F.2d 817, 819 (CA 10); *NLRB v. Bakery & Confectionery Workers Local 50*, 245 F.2d 542 (CA 2); *NLRB v. General Drivers Local 968*, 225 F.2d 205, 210-211 (CA 5), *cert. denied* 350 U.S. 914; *NLRB v. Business Machines & Appliance Mechanics*, 228 F.2d 553 (CA 2), *cert. denied* 351 U.S. 962.

> employer necessarily invites employees to make common cause with the picketing union and to refrain from working behind the picket line, irrespective of the literal appeal of the legends on the picket sign. Accordingly, the majority concluded that the picketing of retail stores with signs urging customers not to buy products of the primary employer constituted inducement or encouragement of employees of neutral employers within the meaning of Section 8(b)(4)(i) of the Act. The Board has reconsidered this doctrine of the *Perfection Mattress* case and a majority has now decided that picketing of a secondary employer's premises does not *per se* constitute inducement or encouragement of employees of neutrals within the meaning of clause (i) of Section 8(b)(4), nor does it raise an irrebuttable presumption as to the intent or probable consequences of the picketing. Whether in any given case picketing is intended or calculated to 'induce or encourage' employees of secondary employers to engage in a work stoppage or refusal to perform services is to be determined by all the evidence in *that particular* case and not by an *a priori* assumption."

Having rejected a *per se, a priori* rule in cases involving an allegedly unlawful "inducement," the Board in the same breath asserts that all consumer picketing is *per se* "coercion." As the cases collected in footnote 6, *supra*, pg. 10, demonstrate and as the Board now acknowledges, in cases involving alleged violations of Section 8(b)(4)(i), *per se* rules are inconsistent with the origin, purposes and language of Section 8(b)(4). *Per se* rules fly in the face of this Court's admonition that there is " '[n] o rigid rule which would make . . . [a] few factors conclusive [which] is con-

tained in or deducible from the statute.' " *Local 761 v. Labor Board,* 366 U.S. 667, 674. The Board should not be permitted to engraft upon Section 8(b)(4)(ii) a *per se* rule more onerous than that which it unsuccessfully attempted to engraft upon Section 8(b)(4)(i).

Although there is no rule of law requiring logical consistency in the reading of different portions of a single statute, certainly consistency is to be preferred if the statute permits it. Thus, if, as this Court has said, "coercion" is a "restricted phrase" when contrasted with "inducement," it is, we submit, reasonable to conclude that Section 8(b)(4)(i) has a broader reach than does 8(b)(4)(ii). Yet, in this case, the Board *on the facts* found no "inducement" while simultaneously postulating an irrebuttable presumption of "coercion."

Paraphrasing the Board's decision in this case, it is submitted that the question of whether picketing restrains or coerces "is to be determined by all the evidence in [the] particular case and not by *a priori* assumption" (R. 40). The fact of "picketing of a secondary employer's premises does not *per se* constitute" coercion "nor does it raise an irrebuttable presumption as to the intent or probable consequences of the picketing" (R. 39-40). This was the construction adopted by the court below (R. 65-66) and the construction which this Court should adopt.

**3. The legislative history of the 1959 amendments to the Act does not support the Board's contentions.**

The Board in its opinion in this case expressed the view that "by literal wording of the proviso [to Section 8(b)(4)] as well as through the interpretive gloss

placed thereon by its drafters, consumer picketing in front of a secondary establishment is prohibited" (R. 41). Presently, however, the Board contends that such picketing constitutes "coercion" within the meaning of Section 8(b)(4)(ii) and that any other reading of the Act would constitute a repudiation of the intention of the Congress. The "legislative history" of the 1959 amendments to the Act is, we submit, at best confused and unreliable. As one close student put it (Fleming, "Title VII; The Taft-Hartley Amendments," 54 Northwestern U. L. Rev. 666, 667):

> "Analysis of the amendments is rendered more difficult by the lack of a satisfactory legislative history. The Landrum-Griffin bill, which passed the House, was made up of provisions taken from other bills; it differed from the Kennedy-Ervin bill, which passed the Senate, principally in the Taft-Hartley amendments. No hearings were ever held on the Landrum-Griffin bill, and the extensive Kennedy-Ervin hearings are of little help since that bill contained only minor Taft-Hartley changes. When the conferees from the House and the Senate had adjusted their differences they offered the Labor-Management Reporting and Disclosure Act of 1959 to both houses. The Managers on the Part of the House submitted a Conference Report which is both incomplete and at times confusing, and the Senate simply heard a report from Senator Kennedy, and then engaged in a limited amount of debate. This meager legislative history, plus the compromises without which the conferees could not compose their differences, foretell prolonged litigation before it will be possible to say with any degree of confidence what some of the amendments mean."

Professor Aaron expressed the same thought perhaps more picturesquely when he said ("The Labor-Management Reporting and Disclosure Act of 1959," 73 Harv. L. Rev. 1086, 1126):

> "Anyone who has followed the history of the Taft-Hartley Act since its passage in 1947 cannot fail to be impressed by the achievement of the Eighty-sixth Congress in agreeing upon substantial amendments to that law. The result, however, does not excite admiration; rather, it reminds one of the celebrated comparison made by Samuel Johnson between a woman preaching and a dog walking on his hind legs: 'It is not done well; but you are surprised to find it done at all.'"

To the extent that the legislative history is helpful it indicates that the Congress was concerned about the use of consumer picketing as a device to impose an embargo against a retail establishment; that is, picketing for the purpose of inducing customers to cease patronizing the picketed store because that store is handling an unfair product. There is no clear evidence of an intent to proscribe a product boycott which "in a classical sense . . . is not even a secondary, but only a primary, boycott" (Bd. Br. in *Servette*, pg. 12n, No. 111, October 1963 Term). The Board's repeated use of the term "secondary consumer boycott" (Bd. Br. 9, 12, 16, 27, 29) represents a wholly unjustifiable effort to add unfavorable coloration to conduct which on the record in this case is without question primary in character.

The "secondary boycott" at which the Act was aimed, when originally enacted in 1947, was a boycott of "employer A because employer A uses or otherwise deals in the goods of, or does business with employer B" (H.R.

Rep. No. 510, 80th Cong. 1st Sess. 43). Because such boycotts were from time to time effectuated through means which did not violate Section 8(b)(4) Congress amended the Act in 1959. When Senator Goldwater and then Senator Kennedy talked about "consumer boycotts" they were referring to a boycott of the secondary employer.[7] Accordingly, the Board's reliance upon Senator Kennedy's statement that "we were not able to persuade the House Conferees to permit picketing in

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[7] Upon passage of the House bill on August 14, 1959, the House appointed its conferees to meet with the Senate (2 Leg. Hist. 1702). The Senate appointed its conferees on August 17, 1959 (2 Leg. Hist. 1351). While the bills were being considered in conference, Senate conferees on several occasions made statements to the Senate.

Senator Goldwater, in an attempt to clarify misunderstandings as to the meaning of certain terms, including "secondary consumer boycott," made the following statement:

"I have . . . prepared a glossary of terms which might be used in any debate which might ensue over any legislation. I am also mailing a copy of it to each of my colleagues, because *I find in speaking to them there is a general misunderstanding of many of these terms*, which seem rather simple to those who live with them day after day.

* * *

"1. Secondary boycott: A secondary boycott involves the application of pressure—usually economic pressure—on one company for the purpose of forcing it to stop doing business with another company. There are two types of secondary boycotts: the secondary employee boycott and the secondary consumer boycott.

* * *

"A secondary consumer, or customer, boycott involves the refusal of consumers or customers to buy the products or services of one employer in order to force him to stop doing business with another employer" (2 Leg. Hist. 1386 (1)).

In the midst of the conference, the Senate conferees returned to the Senate to report on their progress. Senator Kennedy stated that the Senate conferees had agreed to "prohibit threats or coercion of employers" (2 Leg. Hist. 1383 (3)). He added, however, that they were insisting on a "publicity proviso," the effect of which he stated would be as follows:

"Workers would not be denied under the substitute the traditional right to ask the public not to patronize one who sells nonunion goods or goods of a manufacturer engaged in a labor dispute" (2 Leg. Hist. 1377 (2)).

This is the only explanation of the purpose of the proposed "publicity proviso" which we have found.

front of that secondary shop" is misplaced (Bd. Br. 24-25). The Board has taken the statement out of context. Senator Kennedy had previously announced that the purpose of *his* proviso was to preserve "the traditional right to ask the public not to patronize one who sells nonunion goods" (2 Leg. Hist. 1377 (2)). The sentence quoted by the Board refers to a compromise reached by the conferees with respect to that traditional right. In context, it does not refer to picketing which asks only a boycott of the primary product, for such picketing was not under discussion. Indeed, the affirmation of "buy-America" campaigns (2 Leg. Hist. 1432 (1)) which immediately follows the sentence relied on by the Board, belies the significance which the Board would attach to the sentence. We therefore submit that the Legislative History on the Senate side neither supports nor requires the construction contended for by the Board.

In the House, Congressman Griffin, whose name forms a part of the colloquial title of the 1959 amendments, said (2 Leg. Hist. 681):

> "... If the purpose of the picketing is to coerce or to restrain the employer of that second establishment, to get him not to do business with the manufacturer—then such a boycott could be stopped.
>
> "MR. BROWN: * * * Would that same rule apply to the picketing at the customer entrances, for instance, of plumbing shops or newspapers that might run the advertising of these concerns, or radio stations that might carry their program?
>
> "MR. GRIFFIN: Of course, this bill and any other bill is limited by the constitutional right of free speech. If the purpose of the picketing is to coerce

the retailer not to do business with the manufacturer, whether it is plumbing—

"MR. BROWN: * * * Advertising.

"MR. GRIFFIN: Advertising, or anything else, it would be covered by our bill. It is not covered now."

If Congressman Griffin meant what he said, it is obvious that he attached two important conditions to the applicability of the Act to consumer picketing. First, the picketing must be actually intended to coerce the retailer. Second, the Act must be read in light of the Union's rights of free speech guaranteed by the First Amendment. The Board in this case fails on both counts.

There was no coercion of Safeway in this case. Indeed Safeway was not sufficiently concerned to file an unfair labor practice charge. There were no work stoppages or interferences with deliveries. There is no evidence that Safeway suffered in any way or was likely to suffer any injury as a consequence of the Union's activity.

**B. The Union's Consumer Picketing Did Not Have An Object of Forcing or Requiring Safeway to Cease Doing Business with Tree Fruit.**

Independently of the reasons set forth above, the Union submits that the Board's order was properly set aside because the record will not support a finding that the Union sought an objective proscribed by Section 8(b)(4). As Judge Learned Hand has observed, "the 'object' of an action is the concluding state of things that the actor seeks to bring about: that which

satisfies his aim. Hence, it is a term relative to a whole sequence of steps that he proposes, and it does not apply to those which are only intermediate to it." *Douds v. Int'l Longshoremen's Ass'n*, 224 F.2d 455, 459 (CA 2). Different language was used to make the same point in *Seafarers Int'l Union v. NLRB*, 265 F.2d 585, 591-592 (C.A.D.C.):[8]

> "The statute makes the 'object thereof' the critical factor. Did the union intend to place a boycott on [the primary employer] alone, with only an incidental economic effect on [the neutral employers], or did it intend to place a boycott on [the neutral employers] along with [the primary employer]?"

The only "object" which the Union sought to achieve is that alleged in paragraph VII of the amended complaint and admitted in the Union's answer. The Complaint alleges in paragraph VII (R. 12) and the Answer admits (R. 14) that:

> "Commencing on or about December 27, 1960, respondent local . . . in furtherance of the objects referred to in paragraph VI hereof [to obtain certain contractual agreements on behalf of the employees of the employer members of Tree Fruits] engaged in picketing at the premises of retail stores of Safeway, located in and about Seattle, Washington. . . ."

The Union, by the legend carried on its picket signs (R. 20), the instructions issued to its pickets (R. 27-28), and the handbills which it distributed in connection with the boycott program (R. 32), made it plain to all that it was boycotting "Washington State

[8] This case was approvingly cited in *Local 761 v. Labor Board*, 366 U.S. 667, 673.

Apples" and not Safeway. No demands of any kind were made on Safeway. The thrust of the boycott was against Tree Fruits. Safeway did not suffer even "incidental economic effects." *Seafarers International Union v. NLRB*, 265 F.2d 585, 591-592 (C.A.D.C.).

Faced with a record barren of evidence supporting the claim that the Union sought a proscribed objective, the Board again invoked legal presumption:

> "The purpose of picketing the Safeway stores was to persuade consumers not to purchase non-union Washington State apples which Safeway in turn purchased from members of Tree Fruits. The natural and foreseeable result of such picketing, if successful, would be to force or require Safeway to reduce or to discontinue altogether its purchases of such apples from the struck employers. It is reasonable to infer, and we do, that Respondents intended this natural and foreseeable result. Accordingly, we find that the foregoing picketing violated Section 8(b)(4)(ii)(B) of the Act." (R. 41)

In the first place, the Board's implied holding that a possible reduction in purchases is tantamount to a cessation of business is unprecedented. *Compare: Retail Clerks Local 770 v. NLRB*, 296 F.2d 368 (C.A.D.C.). What the Board has done is to substitute *possible* "incidental economic effects" for the statutorily required proof of objective. Neither the employer's fears nor the Union's hopes are relevant here. *Cf. Eastern R. R. Conf. v. Noerr Motor Freight*, 365 U.S. 127, 142-143; *Seafarers Int'l Union v. NLRB*, 265 F.2d 585, 592 (C.A.D.C.).

To equate "object" and "effect" is to destroy the line between "primary" and "secondary" conduct. Al-

though the line is not "glaringly bright," the Act "compels the task" of "the drawing of lines more nice than obvious." *Local 761*, 366 U.S. at 673, 674. Compound possibilities relied upon by the Board will not suffice.

Since the enactment of the Wagner Act this Court has consistently required proof of a proscribed objective. In *Teamsters 357 v. Labor Board*, 365 U.S. 667, the Board argued that hiring hall clauses were illegal *per se* unless they contained protective stipulations. The Board argued that in light of *Radio Officers Union v. Labor Board*, 347 U.S. 17, it was required only to show that the "tendency to encourage or discourage union membership was *foreseeable* to the employer or union." (Ibid at 678) (Italics in original). Though it accepted the Board's finding that the foreseeable consequences of a hiring hall was to encourage union membership, this Court rejected the Board's contention, of *per se* illegality.

In his concurring opinion, Justice Harlan asserted: "What in my view is wrong with the Board's position in these cases is that a mere showing of a foreseeable encouragement of union status is not a sufficient basis for a finding of violation of the statute." (Ibid at 679).

The implicit requirement of the Act that an unfair labor practice be predicated upon objective—not upon foreseeable result—is made explicit in Sec. 8(b)(4). For, as this Court said in *Carpenters Local 1976 v. Labor Board*, 357 U.S. 93, 98, "It [Sec. 8(b)(4)] describes and condemns specific union conduct directed to specific objectives. . . ."

In this case the Union had no dispute with Safeway; it did not seek to inflict economic injury upon Safeway.

The sole objective of the Union's picketing was to bring pressure upon the primary employer by means of informing the public of its dispute with that primary employer and requesting the public to refrain from aiding the primary employer by purchasing his product. Had the Union intended the picket line to bring economic pressure against Safeway, it would have—in the words of Senator Goldwater—"picketed the distribution company B [Safeway] who carried company A's product [Washington State apples] for sale for the purpose of inducing customers not to patronize company B [Safeway]. . . . " 2 Leg. Hist. 1857.

Thus, independently of the reasons set forth in the opening sections of this brief, it is submitted that the Board's order was properly set aside because the record will not support a finding of proscribed objective. Moreover, as we shall demonstrate, the Board's view unnecessarily requires the consideration of substantial constitutional issues; and for this reason alone should be rejected since a more reasonable construction which avoids such issues is available.

## II. SINCE PICKETING IS PROTECTED BY THE FIRST AMENDMENT, THE BOARD'S CLAIM THAT PICKETING PER SE IS "COERCION" RAISES SUBSTANTIAL CONSTITUTIONAL ISSUES; AND WHEN THE ACT IS APPLIED TO RESTRAIN THE UNION'S CONSUMER PICKETING, THE ACT IS UNCONSTITUTIONAL

### A. The Board's View of the Act Unnecessarily Raises Substantial Constitutional Issues.

It is a "cardinal rule of construction, that where the language of an act will bear two interpretations, equally obvious, that one which is clearly in accordance with

the provisions of the Constitution is to be preferred." *Knights Templar & M. Life Indem. Co. v. Jarman,* 187 U.S. 197, 205. To reject the Board's claim that picketing *per se* is coercion does not require an antecedent determination of constitutional right. The Board's view raises a substantial constitutional problem, and this alone is an adequate ground for adopting the more reasonable construction urged by the Union. Quoting from *United States v. Delaware & H. Co.,* 213 U.S. 366, 408, this Court said in *United States v. CIO,* 335 U.S. 106, 121n:

> "It is elementary when the constitutionality of a statute is assailed, if the statute be reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars' & M. L. Indem. Co. v. Jarman,* 187 U.S. 197, 205, 47 L.Ed. 139, 145, 23 S.Ct. 108. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman v. Interstate Commerce Commission,* 211 U.S. 407, 58 L.Ed. 253, 29 S.Ct. 115."

We are here concerned with peaceful picketing, "the working man's means of communication." *Drivers*

*Union v. Meadowmoor Co.*, 312 U.S. 287, 293. As explained in *Carlson v. California*, 310 U.S. 106, 112-113:

> "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. * * * [Publicizing] the facts of a labor dispute in a peaceful way through appropriate means, whether by pamphlet, by word of mouth, or by manner, must now be regarded as within that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgement by a state."

In the area of free speech, " 'The door barring federal . . . intrusion . . . cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests.' *Roth v. United States* (354 U.S. [476] at 488)." *Smith v. California*, 361 U.S. 147, 155. See also: *Bantam Books v. Sullivan*, 9 L.Ed.2d 584, 591; *Wood v. Georgia*, 370 U.S. 375, 388.

After *Bakery Drivers Local v. Wohl*, 315 U.S. 769, the decisions of this Court accorded considerably more latitude to governmental restrictions upon picketing than was allowed in other free speech areas such as handbilling. Compare, for example, *Staub v. Baxley*, 355 U.S. 313, 322-325, with *Teamsters v. Vogt*, 354 U.S. 284, 293, or *Near v. Minnesota*, 283 U.S. 697, 713, 721, with *Hughes v. Superior Court*, 339 U.S. 460, 465-466. The difference was said to be justified because "the loyalties and responses evoked and exacted by picket lines are unlike those flowing from appeals by printed word." *Hughes*, 339 U.S. at 465. In days gone by or on the

record[9] in the particular cases which have come before this Court, the view expressed in *Hughes* was perhaps an understandable one. But today and on the record before this Court in this case it is not.

In 1963 one may seriously question whether a picketing does evoke responses different from those evoked by handbilling or other forms of communication. In the case at bar most of the struck employers were in full operation within a week after the strike started (Appen. A., infra, pg. 34). If workingmen and women in the rural Yakima Valley were ready and willing to take the jobs of their neighbors—and they did—what then is the impact of two women (R. 33) picketing at a metropolitan Seattle supermarket with signs and handbills disclaiming any dispute with the store?[10] Viewed realistically and in light of the record in this case, the Union was engaged in supplying "the public

[9]For example, in *Hughes* (October Term 1949, No. 61) the Plaintiff alleged (R. 6) and the Defendant did not deny (R. 20) "that there exists between organized labor and labor unions in the county of Contra Costa a common agreement and understanding that neither the unions, nor the members thereof, will pass through a picket line, whether the objectives of that picket line are legal or illegal, proper or improper." And in this Court the Plaintiff (Respondent) argued (Br. pg. 8-9): "Furthermore, the undenied allegation of the complaint that organized labor in the area had an agreement and understanding not to pass through any picket line, legal or illegal, suggests that . . . this was a case where organized labor extended its sympathy and support to the dispute with all the familiar consequences that such support entails."

[10]The attitude of workers and the public toward union picket lines has undergone important changes in recent years. This is in part a result of the "non-effect" concept introduced by Section 8(b)(7) (*See e.g. Jay Jacobs Downtown, Inc.*, 140 NLRB No. 127); in part the result of the uncertainty surrounding a worker's right to respect a picket line (*See e.g. Redwing Carriers, Inc.*, 137 NLRB 1545); and in part the result of apathy. *Cf.* Barkin, "The Decline of the Labor Movement," Center for the Study of Democratic Institutions (1961). These factors among others render untenable any dogmatic assertions with respect to the nature or effect of any given picketing situation.

need for information and education with respect to the significant issues of the times." *Thornhill v. Alabama,* 310 U.S. 88, 102.

*Hughes v. Superior Court,* 339 U.S. 460 does not support a contrary conclusion. As this Court observed in *Hughes,* 339 U.S. at 465, "[h]owever general or loose the language of opinions, the specific situations have controlled decision." *Hughes* in fact presented a situation radically different from that in the case at bar. In *Hughes* the picketing was conducted by a Negro group and "at the time of the controversy about 50% of the customers of the [picketed] store were Negroes." 339 U.S. at 461. In the case at bar there is no evidence of the percentage of Teamster Union members who patronized Safeway.

In *Hughes* the picketing was designed to effect an embargo upon the picketed store. In the instant case the Union meticulously and successfully conducted its program in a manner which precluded an embargo upon Safeway. The Board's refusal to distinguish between picketing at a store to induce customers to refrain from purchasing a given *product* and picketing intended to induce customers to boycott the *store* has resulted in not only the Board's unwarranted reliance upon *Hughes* but also its erroneous reading of the legislative history of the Act. Moreover, in *Hughes* the stated objective of the picketing was to compel the picketed employer to employ Negroes on a pro-rata, population basis. But in the case at bar Safeway was not picketed. The public was specifically advised that the Union had no dispute with Safeway. The Union's program in this case sought to persuade customers to refrain from pur-

chasing Tree Fruits apples—an object which is *not* unlawful. In short, the picketing in *Hughes* sought to achieve an unlawful objective whereas in this case the object of the picketing is lawful. The only similarity between *Hughes* and this case is that in both the picketing occurred at the premises of a retail store; and surely this falls far short of the Board's mark.

The Board is peradventure serious in suggesting that the Union's picketing was not entitled to First Amendment protection since it was free to handbill (Bd. Br. 30). Presumably, then handbilling can be banned if television is available and television can be banned if newspapers are available and newspapers can be banned if picketing is available. The answer of course is that:

> "'[The] streets are natural and proper places for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' *Schneider v. State,* 308 U.S. 147, 193." *Thornhill,* 310 U.S. 88, 105-106. Accord: *Jamison v. Texas,* 318 U.S. 413, 416.

As the court below correctly said, "it may well be that the picketing in this case is closer to the core notion of constitutionally protected free speech than the picketing the Supreme Court has held may be banned" (R. 63-64). A careful review of the First Amendment picketing cases which have been before this Court will not disclose a single case, other than this case, in which the union affirmatively and successfully deleted from its picketing all signal aspects. And, as noted above, it

was this signal aspect of picketing which rendered it subject to otherwise prohibited regulation in those cases.

**B. The Act Is Unconstitutional When Applied to Prohibit the Union's Consumer Picketing.**

Were this Court to construe the Act as prohibiting the Union's picketing, it would become necessary to decide—under the standards developed in non-picketing free speech cases—whether constitutional rights were transgressed. The "more than free speech" approach embodied in this Court's earlier decisions does not fit this case. Applying the standard enunciated in cases such as *Staub v. Baxley,* 355 U.S. 313, 322-325 and *Talley v. California,* 362 U.S. 60, 63, 65, it is obvious that a restraint upon the Union in this case would deny First Amendment rights. It is not without significance that the only First Amendment case in which an attempt was made to justify a restraint upon peaceful picketing on the theory that the picketing was *per se* coercive resulted in a *per curiam* reversal. *Chauffeurs Union v. Newell,* 356 U.S. 341, *reversing* 180 Kan. 898, 317 P.2d 817.

Returning to our point of origin, we again point out that this case does not require a determination of constitutional right. On the record it is clear that the Union's claim to constitutional protection is substantial, and this is reason enough to reject the strained construction of the Act which the Board seeks to defend.

The Act prohibits threats, restraint and coercion. On the record there was none. In cases arising under the Act *(Drivers Local 639 v. Labor Board,* 362 U.S. 274)

and under the First Amendment *(Chauffeurs Union v. Newell,* 356 U.S. 341) this Court has considered and rejected the contention that picketing is *per se* coercion. The construction of the Act adopted by the court below requires proof of coercion—something which the Board would omit. By requiring the Board to prove on the record in each case that the picketing in fact was coercive, full range can be given the Act without risking a trespass upon constitutional right. This should be required.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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## APPENDIX A

**BEFORE THE APPEAL TRIBUNAL**
**EMPLOYMENT SECURITY DEPARTMENT**
**STATE OF WASHINGTON**

| | |
|---|---|
| IN RE: Employees of Hansen Fruit and Cold Storage Company, *et al.* | **DECISION** (Shown on the attached DOCKET NUMBERS schedule) |

Pursuant to notices to all interested parties, this matter came on regularly for hearing on the 15th day of November, the 5th day of December, 1960, and the 16th day of January, 1961, at Yakima, Washington, before William H. Dunham, Appeal Examiner.

APPEARANCES: Appellant *Hansen Fruit and Cold Storage Company, et al.*, by the Tree Fruits Labor Relations Committee, Incorporated through their attorneys, the firm of Velikanje and Moore (by Mr. Charles C. Countryman).

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Claimant *Lydia Hadley, et al.*, represented by the Fruit and Vegetable Workers Union, Local 760, Yakima, Washington, through the firm of Bassett, Davies and Roberts, Attorneys-at-law (by Mr. Sam Bassett).

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*Employment Security Department*, by Paul J. Murphy, Assistant Attorney General.

STATEMENT OF THE CASE: The individuals listed on the attached schedule of employers and claimants are claimants for benefits under the Employment Security Act. Each was issued one of two types of deter-

minations. One type denied benefits for a specific week or weeks on the basis that his or her unemployment was due to a stoppage of work which exists because of a labor dispute at the premises where he or she was last employed, and allowed benefits beginning with a specific week, on the basis that his or her unemployment was no longer due to a stoppage of work at the premises where he or she was last employed. The other type of determination issued held that the individual claimant's unemployment was not due to a stoppage of work at the premises where he or she was last employed, and benefits were allowed. From these allowance of benefits, the interested employers listed on the attached schedule filed timely Notices of Appeal.

FINDINGS OF FACT: Beginning August 29, 1960, and continuing through November 3, 1960, the various claimants listed on the attached schedule were called out on strike by the Fruit and Vegetable Workers Local No. 760 of Yakima. The dates that the individual stoppages of work occurred are as follows:

Hansen Fruit and Cold Storage Company of Yakima,
August 29, 1960

Washington Fruit and Produce Company of Yakima,
September 2, 1960

Nordberg Selah Fruit, Inc., of Yakima,
September 6, 1960

Perham Fruit Corporation (Grandview operation),
September 6, 1960

Perham Fruit Corporation (Zillah operation),
September 12, 1960

Perham Fruit Corporation (Yakima operation),
September 19, 1960

Prentice Packing & Cold Storage Co. of Yakima,
September 2, 1960

Yakima Fruit & Cold Storage of Yakima,
August 29, 1960

Highland Fruit Growers, Inc. of Yakima,
September 6, 1960

Stadelman Fruit, Incorporated (Zillah operation),
August 29, 1960

C. M. Holtzinger Fruit Co., Inc. (Yakima operation),
September 20, 1960

Stadelman Fruit, Incorporated (Yakima operation),
September 6, 1960

Richey and Gilbert Company of Yakima,
August 29, 1960

Larson Fruit Company (Selah operation),
September 2, 1960

Roche Fruit Company, Incorporated of Yakima,
August 31, 1960

J. M. Perry Ice & Storage Company of Yakima,
September 6, 1960

Williams Fruit Company of Yakima,
November 3, 1960

The appellants are all members of the Tree-Fruit Labor Relations Committee, an association of Yakima Valley employers who has for some 23 years negotiated with Local No. 760 of the Fruit and Vegetable Workers on their labor matters. The contract with Local No. 760 had expired May 15, 1960, prior to the beginning of this dispute.

On the dates indicated above, picket lines were established around the individual premises of the employers. Operations of the various packing houses immedi-

ately ceased or were severely curtailed for periods of one day to one week. Many of the plants continued to operate with employees who did not go out on strike, and others had stand-by crews which were called immediately. By the end of three days the majority of the plants were back in full operation. Picket lines were maintained, and were still in existence at the time of this hearing. All of the claimants involved went out on strike and refused to cross the picket lines. Benefits were denied the claimants by the Department for periods that operations were curtailed, and were allowed beginning with the resumption of full operations of the individual employer involved.

On occasions the warehouses were picketed 24 hours a day. The union had approximately 1,500 members available for picket duty. Those individuals engaged in picket duty served a four-hour shift one to six days a week, depending upon their desires. In addition to picket duty, there were picket captains, individuals performing baby-sitting duties for others who were on picket duty, people serving refreshments to pickets, and others assisting in office work connected with the strike.

Strike benefits were paid all individuals performing picket duty or duties related to the picketing operation by the union. For the first week of picket duty, no strike benefits were paid. Beginning with the second week of the dispute, benefits in the amount of $30.00 each week were payable to qualified people through the fourth week of the dispute. Beginning with the sixth week of the dispute, benefits were reduced to $25.00, and were maintained at that amount for an indefinite period. The

strike benefits were *donated* by the International Brotherhood of Teamsters and by the Western Conference of Teamsters, in order to help the strikers to meet the minimum economic needs during the period of the dispute. In order to qualify for strike benefits, an individual had to be available for some form of strike activity such as picketing or assistance to picketing.

There were many non-union packing houses, and a few union houses (number undetermined) that had not been struck at the time of the hearing. These plants continued to operate.

*Conclusions:* The only issue before this Tribunal is whether any of the claimants are to be disqualified under Section 77 of the Act (Labor Dispute Provision). Section 77 of the Act provides as follows: * * * (Discussion omitted)

DECISION: The determinations for the individual claimants under appeal, as set forth on the attached schedule of employers and claimants, are hereby affirmed; benefits are allowed, or denied in accordance with those determinations.

Dated at Olympia, Washington, this 27th day of February, 1961.

WILLIAM H. DUNHAM
*Appeal Examiner*

[Schedule of Employers and Claimants, Lydia Hadley, *et al.* (Omitted)]

# In the Supreme Court of the United States

OCTOBER TERM, 1963

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No. 88

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, ET AL.

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No. 111

NATIONAL LABOR RELATIONS BOARD, PETITIONER

*v.*

SERVETTE, INC.

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*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA AND THE NINTH CIRCUITS*

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**COMPARISON OF PERTINENT PORTIONS OF SECTION 8 OF THE TAFT-HARTLEY ACT AND THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959**

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For the use of the Court, we set out below a comparison of pertinent provisions of Section 8 of the Taft-Hartley Act of 1947 (61 Stat. 136, 29 U.S.C. 158 (1958 ed.)) and the amendments to those provisions effected by the Labor-Management Reporting



730-946—64

and Disclosure Act of 1959 (73 Stat. 519, 29 U.S.C. 158 (Supp. II 1959-60 ed.)). The text of the Taft-Hartley Act is printed in roman type. Matter added by the Labor-Management Reporting and Disclosure Act of 1959 is in italics. Matter deleted by the 1959 Act is in brackets.

UNFAIR LABOR PRACTICES

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * * *

(4)(*i*) to engage in, or to induce or encourage [the employees of any employer] *any individual employed by any person engaged in commerce or in an industry affecting commerce* to engage in, a strike or a [concerted] refusal in the course of [their] *his* employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services [,]; *or* (*ii*) *to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce,* where *in either case* an object thereof is—

(A) forcing or requiring any employer or self-employed person to join any labor or employer organization [or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;] *or to*

*enter into any agreement which is prohibited by section 8(e);*

(B) forcing or requiring any [any employer or other] person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 [;]: *Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing;*

(C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9;

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order

or certification of the Board determining the bargaining representative for employees performing such work:

*Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act: *Provided further, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution:* [1]

* * * * *

*(7) to picket or cause to be picketed, or threaten to picket or cause to be picketed, any employer where an object thereof is*

[1] The text of the Taft-Hartley Act is printed in roman type. Matter added by the Labor-Management Reporting and Disclosure Act of 1959 is in italics. Matter deleted by the 1959 Act is in brackets.

*forcing or requiring an employer to recognize or bargain with a labor organization as the representative of his employees, or forcing or requiring the employees of an employer to accept or select such labor organization as their collective bargaining representative, unless such labor organization is currently certified as the representative of such employees:*

*(A) where the employer has lawfully recognized in accordance with this Act any other labor organization and a question concerning representation may not appropriately be raised under section 9(c) of this Act.*

*(B) where within the preceding twelve months a valid election under section 9(c) of this Act has been conducted, or*

*(C) where such picketing has been conducted without a petition under section 9(c) being filed within a reasonable period of time not to exceed thirty days from the commencement of such picketing: Provided, That when such a petition has been filed the Board shall forthwith, without regard to the provisions of section 9(c)(1) or the absence of a showing of a substantial interest on the part of the labor organization, direct an election in such unit as the Board finds to be appropriate and shall certify the results thereof: Provided further, That nothing in this subparagraph (C) shall be construed to prohibit any picketing or*

*other publicity for the purpose of truthfully advising the public (including consumers) that an employer does not employ members of, or have a contract with, a labor organization, unless an effect of such picketing is to induce any individual employed by any other person in the course of his employment, not to pick up, deliver or transport any goods or not to perform any services.*

*Nothing in this paragraph (7) shall be construed to permit any act which would otherwise be an unfair labor practice under this section 8(b).*

Respectfully submitted,

ARCHIBALD COX,
*Solicitor General.*

FEBRUARY 1964.

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